Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

No. 04-041239

In The
Supreme Court of the United States

JAIME CARDENAS-GARCIA and JAHAN RASTY,

Petitioners,

v.

TEXAS TECH UNIVERSITY, THOMAS BURTON, individually and in his official capacity as Chair of the Mechanical Engineering Department at Texas Tech University; WILLIAM MARCY, individually and in his official capacity as Associate Dean and later Dean of the College of Engineering at Texas Tech University,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 14, 2005

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QUESTION PRESENTED

1. Should this Court grant certiorari to resolve an acknowledged and intractable circuit split over the standard for what constitutes actionable retaliation in a Title VII suit under 42 U.S.C. § 2000e-3(a), including what employer conduct meets the appropriate threshold for actionable retaliation under Title VII?

2. Should this Court grant certiorari to resolve the circuit split regarding what employer conduct constitutes actionable discrimination in a Title VII suit under 42 U.S.C. § 2000e-2?

PARTIES TO THE PROCEEDINGS BELOW

All parties are set forth in the caption of the case.

RELATED CASES

The first question presented in this case is substantially the same as the second question presented in *Stavropoulos v. Firestone, et al.*, Case No. 04-1099, which is before this Court on a Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jaime Cardenas-Garcia and Jahan Rasty respectfully request that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case finding that lower salaries for Petitioners when compared to similar non-minority faculty, disciplinary investigations and poor performance reviews that resulted in lesser pay increases than received by comparable Anglo professors did not constitute actionable discrimination or retaliation under Title VII or Section 1981.

OPINIONS BELOW

The relevant opinions and orders of the United States District Court for the Northern District of Texas (Pet. App. at 4a-69a) and the United States Court of Appeals for the Fifth Circuit (*id.* 1a-3a) are reproduced in the appendix. The court of appeals' decision is unreported, but may be found at 2004 U.S. App. LEXIS 25801.

JURISDICTION

The opinion and judgment of the court of appeals was entered on December 14, 2004. This petition is filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition involves Sections 702(a) and 703(a) of the 1964 Civil Rights Act, respectively referred to as the non-discrimination and anti-retaliation provisions of Title VII, which are codified at 42 U.S.C. §§ 2000e-2(a), 2000e-3(a). The petition also involves 42 U.S.C. §§ 1981 and 1983. The pertinent text of these provisions is set forth in the Pet. App. at 70a-71a.

STATEMENT

This case is brought by Jaime Cardenas-Garcia (Cardenas-Garcia) and Jahan Rasty (Rasty) against their former employer, Texas Tech University (TTU) and their former supervisors, Thomas Burton (Burton) and William Marcy (Marcy), both in their individual and official capacities, under Title VII and 42 U.S.C. §§ 1981 and 1983 for employment discrimination based on national origin and retaliation. Respondents' acts of discrimination and retaliation included: imposing lower salaries for Petitioners when compared to similar non-minority faculty; unjustified poor performance reviews which resulted in proportionately lower raises and salaries; and internal investigations into alleged misconduct and other issues.

Applying a standard that conflicts with other circuits, the Fifth Circuit held that these actions did not qualify as "ultimate employment actions" and that Petitioners' discrimination and retaliation claims therefore were not actionable under Title VII or Section 1981. Pet. App. at 1a-3a. This Court should grant certiorari to resolve circuit conflicts over the statutory interpretation issues raised by this case and to bring needed clarity and uniformity to this most important area of law – protecting public and private employees from discrimination and retaliation in employment.

1. Petitioners Cardenas-Garcia and Rasty are foreign-born (Ecuadorian and Iranian, respectively) citizens of the United States who began working in TTU's Department of Mechanical Engineering ("MED") in 1988 as assistant professors. *See* Pet. App. at 16a, 21a.

The environment in the MED certainly was not welcoming to minority faculty, as Petitioners were subjected to several inappropriate comments during their employment. At faculty meetings in the early 1990's, an Anglo-American faculty member made statements such as: "This is the white section," when referring to seating. Pet. App. at 19a. Another faculty member stated during a committee meeting that "minorities take jobs from white men." *Id.*

In 1994, the chair of the MED resigned as a result of a "no confidence" letter signed by several professors, including Rasty, two additional minority professors and five Anglo-American professors. Pet. App. at 21a; Pet. C.A. Br. at 7-8, R591.[1] Respondent Marcy, the Associate Dean of the College of Engineering at the time, became responsible for finding a new MED chair. Pet. App. at 21a. Respondent Burton started as the new chair in 1995. *Id.* Respondent Marcy later accused Rasty and the two other minority professors who signed the no confidence letter as being responsible for the bad atmosphere within MED, though the non-minority, Anglo professors who signed the no confidence letter were not labeled as "troublemakers." *See id.*; Pet. C.A. Br. at 7-8.

For his part, Respondent Burton openly stated that one of the weaknesses of TTU's MED graduate program was that the majority of graduate students were foreigners. *See* Pet. App. at 17a; Pet. C.A. Br. at 8-9; R1015. He also wrote and sent a March 24, 1998 memo to all MED faculty stating:

> I [Burton] want to improve the reputation and intrinsic quality of the Ph.D program so that 1) it is ranked in the top 60 in the country and 5th in the Big 12, behind UT, TAMU, Colorado and Iowa state and 2) *we establish a reputation sufficiently good to attract quality U.S. Ph.D students into the program each year.*

See id., Pet. C.A. Br. at 8-9, R742 (emphasis added). At a faculty meeting, Cardenas-Garcia challenged Burton to prove the accuracy of his statement that the MED graduate program was deficient because the majority of graduate students were foreigners, but Burton stated that he was too busy to respond. Pet. C.A. Br. at 9; R566.

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[1] As used herein, "R___" refers to the record before the court of appeals and "Pet. C.A. Br. ___" refers to Petitioners' brief before the court of appeals.

In 1999, Cardenas-Garcia chaired a committee searching for a professorial candidate. R1018-1019. During a search committee meeting, an Anglo-American professor stated: "This department is a lumpy melting pot. I will reject all candidates whose names I cannot pronounce. Just kidding." Pet. App. at 18a. Cardenas-Garcia reported this discriminatory comment to Respondent Burton. *See id.* Following Cardenas-Garcia's report, an EEO officer for TTU and the Associate Provost attended the next search committee meeting and informed the faculty members that such offensive comments were inappropriate. *Id.*

Burton then retaliated against Cardenas-Garcia in his very next performance review by stating that Cardenas-Garcia caused "unnecessary disputes between himself and other [faculty-search] committee members, resulting in unnecessary impediments to the search process." Pet. App. at 18a-19a; Pet. C.A. Br. at 9-10. Based on this lower performance rating, Burton gave Cardenas-Garcia a lower raise. *See* Pet. App. at 18a-19a; R1186-1189. The performance review also was discriminatory in that Burton gave the Anglo professor who made the comment a glowing review, stating that this professor's contributions to the MED were "above and beyond the call of duty." *See* Pet. App. at 18a; R657. Later in 2000, Cardenas-Garcia filed a charge with the EEOC claiming, among other things, discrimination and retaliation based on "low negative evaluations by [Respondent] Burton, resulting in lower salary and raises." *See* Pet. App. at 20a; R1535.

In 2000, Cardenas-Garcia also filed internal grievances against Burton for discrimination and retaliation relating to his performance evaluations and for penalizing Cardenas-Garcia with a low salary. *See* Pet. App. at 17a, 20a; Pet. C.A. Br. at 12. Respondent TTU's grievance procedures mandated mediation, and Cardenas-Garcia agreed to mediate. Pet. C.A. Br. at 12, R580-81. However, while the parties attempted to set up a mediation process and schedule, Burton refused to mediate unless Cardenas-Garcia agreed

to withdraw his allegations regarding discrimination and drop his EEOC Charge. *See* Pet. App. at 20a; Pet. C.A. Br. at 12-13; R651-53, 1537 ("I [Burton] will not engage in mediation with you as long as you [Cardenas-Garcia] insist on inextricably tying the aforementioned professional issues to your allegation that I have engaged in racial discrimination against you" and requesting that Cardenas-Garcia "state in direct language whether you are willing to drop the EEOC charge you have filed and whether you are willing to retract the allegation of discrimination from the language in your grievances."). Marcy admitted that it was inappropriate under TTU's policies for Burton to demand that Cardenas-Garcia drop the discrimination allegations and EEOC Charge because Cardenas-Garcia had a right to follow the internal grievance process. *See* Pet. C.A. Br. at 13; R696.

Cardenas-Garcia resigned from TTU in the fall of 2002 to teach at the University of Maryland, giving up his tenured position for a non-tenured one. *See* Pet. App. at 20a-21a.

Petitioner Rasty also complains of disparate treatment and retaliation. In 1996, Rasty traveled to France for a symposium where he was presenting a paper; he sought reimbursement for the trip, but there was an apparent discrepancy regarding the price of airfare. Pet. App. at 22a-23a. Burton refused to reimburse Rasty for the entire trip. *See id.* In 1998, Rasty filed a grievance against Burton, seeking full reimbursement. *Id.*; *see also* R1104. The 1998 grievance also complained that Burton had discriminated against Rasty in regard to salary increases and raised harassment and other issues. Pet. App. at 23a. TTU convened a grievance committee, and in December 1998, the grievance committee granted Rasty reimbursement for portions of the France trip, but denied relief on other issues raised. *Id.*; R1104.

Shortly after the grievance committee issued its December 1998 report, Burton retaliated and further discriminated against Rasty by alleging to Marcy, who was

Dean of Engineering at the time, that Rasty had misrepresented and falsified certain academic-related information. *See* Pet. App. at 24a; R861 (March 12, 1999 e-mail from Burton to Marcy indicating that Burton had told Marcy "a couple of months ago" that Burton believes Rasty "has been guilty of misrepresentation and falsification of information," but that Burton did not report the allegations "a couple of months ago" because Burton and Marcy agreed to wait until an Anglo professor's tenure had been approved). Marcy subsequently recommended that TTU initiate an investigation into the matter. *Id.* Over the course of the next two years, Rasty had to expend significant time and resources defending himself throughout this internal investigation. *See* Pet. App. at 30a. An initial panel recommended that TTU terminate Rasty, but Rasty subsequently appealed to the University Tenure Advisory Committee, which reversed the termination recommendation, finding that Rasty had been denied due process. *See* Pet. App. at 24a-25a. Rasty claimed the misconduct investigation also was discriminatory in that a similarly-situated white employee did not have a formal investigation initiated against him for inaccuracies in his academic-related materials, whereas Rasty did. *See* Pet. App. at 26a-27a.

In a December 10, 1999 letter to the Provost, President, and the Senior Associate Dean of Engineering, Marcy also engaged in retaliation and discrimination by urging his superiors to stop Rasty from participating in a federally-approved research project involving high energy munitions utilizing explosive-driven components for the U.S. Army and Air Force. Pet. App. at 27a-28a. Marcy accused Rasty of having a "hidden agenda" to use this federal research program as a cover for acquiring high explosives and detonators. R1158. Marcy accused Rasty of being a "disgruntled faculty member" whose "behavior has been erratic and threatening." *Id.* Marcy stated that he, Burton and other faculty members would be "at risk if Dr. Rasty is given the legal means to acquire high explosives and detonating devices." *Id.* Marcy made this request

while Rasty was being investigated by an ad hoc committee for allegations of "misconduct in research" instigated by Marcy. Pet. App. at 28a. These accusations were made even though Rasty did not purchase the energetic materials, had no access to the energetic materials, and did not conduct the actual experiments used for the research. Pet. C.A. Br. at 15-17; R1362. Nearly a year later, in October 2000, upon Rasty's discovery of Marcy's accusations, other members of the research project wrote letters to the President to verify that Rasty was not a threat. *Id.*

Marcy made these allegations against Rasty, but did not make such allegations against a similarly-situated Anglo-American professor, Scott Norville. Pet. C.A. Br. at 17. ATF agents confiscated Norville's explosives because he had misused them. *Id.* Norville later confronted and verbally abused one of the ATF agents at a grocery store. *Id.* ATF reported these incidents to Marcy. *Id.* Yet, Marcy did not take any adverse employment actions against Norville or report Norville to the Provost in an attempt to stop Norville's research with explosive materials, as he did with Rasty. *Id.*

Finally, Rasty also received salary increases that were below those of other professors of the same or lesser rank in the MED from 1997 to 2000. Pet. App. at 30a. Burton claims the lower raises are a result of Rasty's lower ratings on his performance reviews. *Id.* Rasty believes that since he filed his grievances and complained of discrimination he has been penalized by Burton through his lower raises and because Burton refuses to remove items from his performance reviews, such as the travel reimbursement incident and other accusations. *See id.*

2. Petitioners subsequently filed this lawsuit. At issue here are two separate claims under separate federal statutes. Petitioners sue Respondent TTU for national origin discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3. Petitioners filed claims against Respondents Burton and Marcy in their individual and official capacities for illegal

discrimination based on ethnicity and retaliation pursuant to 42 U.S.C. §§ 1981 and 1983. Both sets of claims were dismissed by the district court at summary judgment.[2]

On January 20, 2004, the district court granted judgment for Respondents Burton and Marcy on the discrimination and retaliation claims under 42 U.S.C. §§ 1981 and 1983.[3] Pet. App. at 14a-69a. In analyzing the discrimination

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[2] Petitioners also asserted claims for monetary damages against Respondent TTU based on § 1981 and § 1983, which were dismissed in an August 6, 2003 order by the district court as being barred by the Eleventh Amendment. *See* Pet. App. at 16a. Petitioners also asserted substantive and procedural due process claims against Respondents under § 1983, which were dismissed by the district court at summary judgment. *See* Pet. App. at 9a-12a; 56a-57a; 61a-67a. These issues remain to be determined on remand. Here, the court of appeals bypassed these questions to address directly whether Respondents' actions constituted actionable discrimination and retaliation under Title VII and § 1981. *Id.* at 12a-18a. Petitioners specifically reserve their rights to address these issues on any further review by the lower courts.

[3] The district court appears to have allowed the claims to proceed against Marcy and Burton in their individual and official capacities under § 1981 and § 1983. Citing Fifth Circuit precedent, the district held that state employees like Petitioners who complain of discrimination or retaliation "must assert a cause of action against individual fellow employees under § 1983 to remedy violations of civil rights under § 1981" and that liability under § 1981 "will lie against an individual defendant if the individual defendant is essentially the same as the State for the purposes of the complained of conduct." Pet. App. at 37a. The court of appeals did not pass on these issues, and they remain to be determined on remand. This case therefore currently does not present the question whether *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989) remains good law after the 1991 amendment to § 1981, a question that has engendered much debate among the circuits. A split has emerged over *Jett*'s first holding – whether, after the 1991 amendment of § 1981, 42 U.S.C. § 1983 remains the exclusive remedy for a violation of the rights contained in § 1981. *Compare Butts v. County of Volusia*, 222 F.3d 891, 894 (CA11 2000) ("Nothing in the 1991 amendment to § 1981 evinces Congress' desire to alter the Supreme Court's conclusion in *Jett*."), *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178, 1181 (CA8 1998) (holding that "[a] federal action to enforce rights under § 1981 against a state actor may only be brought pursuant to § 1983"), *Dennis v. County of Fairfax*, 55 F.3d 151, 156, n.1 (CA4 1995) (same), *with Federation of African American Contractors*

(Continued on following page)

and retaliation claims, the district court held Petitioners had to prove, *inter alia*, that they suffered an "adverse employment action." Pet. App. at 40a-43a.[4] In regard to this element, the district court candidly noted that "the Fifth Circuit has analyzed an 'adverse employment action' more strictly than other circuits and requires that only an 'ultimate employment decision' can form the basis for liability." *Id.* at 41a, citing *Burger v. Central Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (CA5 1999) and *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (CA5 1997). "'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" Pet. App. at 41a. The district court then listed acts that are *not* ultimate employment decisions under the Fifth Circuit's strict test: "ostracism by coworkers, loss of some job duties, formal discipline, rude treatment by employer, verbal reprimands, threats of potential dismissal, criticism of work or conduct, refusal to consider employee's input in business decision, *and low evaluations that could lead to missed pay increases.*" *Id.* at 42a (emphasis added). The district court further explained that "nothing more than a dispute over the quantum of

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v. City of Oakland, 96 F.3d 1204, 1214 (CA9 1996) (concluding that § 1981 contains an implied cause of action against state actors and that, with the addition of subsection (c), Congress "overturned *Jett*'s holding that 42 U.S.C. § 1983 provides the exclusive federal remedy against state actors for the violation of rights under 42 U.S.C. § 1981"); *see also Felton v. Polles*, 315 F.3d 470, 479-83 (CA5 2002) (questioning whether 1991 amendment to § 1981 altered *Jett* and stating in dicta that state employee's recourse for violations of § 1981 by fellow state employee, either in his official or individual capacity, is exclusively through § 1983); *Anderson v. Conboy*, 156 F.3d 167, 178 n.19 (CA2 1998) (noting the "ambiguity" of whether subsection (c) may create an implied cause of action against state actors, but finding the question irrelevant to its analysis).

[4] In analyzing the claims, the district court utilized a two-year statute of limitations on Petitioners' § 1981 and § 1983 claims, Pet. App. at 45a, which is clear error. *See Jones v. R.R. Donnelly & Sons, Inc.*, 541 U.S. 369 (2004) (holding four-year statute of limitations applies to § 1981 claims arising out of causes of action created by 1991 amendments to § 1981).

pay increases is not an actionable adverse employment activity . . . " *Id.*

In regard to Cardenas-Garcia, the district court found that his discrimination and retaliation claims failed because he was not subjected to an adverse employment action. Pet. App. at 54a. In regard to Cardenas-Garcia's claims that less-than-average pay raises based on poor performance reviews constituted discrimination and retaliation, the district court held that if Cardenas-Garcia had been *denied* a pay raise he would have suffered an "ultimate employment decision," but because he did receive a pay raise (even though it was proportionately less than it should have been due to discriminatory and retaliatory motives), Cardenas-Garcia did not suffer an adverse employment action. *Id.*

In regard to Rasty, the district court held that "[a]n investigation of an employee's alleged misconduct is not an adverse employment action." *Id.* at 59a. Accordingly, the district court concluded that Rasty's discrimination and retaliation claims relating to the investigation of alleged academic dishonesty did not constitute an actionable adverse employment action, even if motivated by illegal discriminatory or retaliatory motives. *Id.* at 59a-60a. The district court also granted summary judgment on Rasty's compensation claims because a "dispute over the quantum of pay increases is not an actionable adverse employment action. . . ." *Id.* at 66a.

On January 22, 2004, the district court granted summary judgment in favor of Respondent TTU on the Title VII discrimination and retaliation claims. Pet. App. at 4a-13a. The district court found that Petitioners "failed to make a prima facie showing of discrimination [or] retaliation that would be actionable" because Petitioner's did not "suffer[] an adverse employment action as required by the prima facie elements of discrimination." Pet. App. at 12a, n.5 (citing *Mota v. Univ. of Tex. Houston Health Science Ctr.*, 261 F.3d 512, 519 (CA5 2001)). Holding that elements of § 1981 claims are "identical" to Title VII claims, the district court "found that [because]

there were no violations for discrimination . . . or retaliation under § 1981 [as found on its order on qualified immunity], it stands to reason that there can be no violations under Title VII." Pet. App. at 13a.

3. On appeal, the Fifth Circuit affirmed on the narrowest of grounds. After finding that Title VII and § 1981 claims are analyzed under Title VII standards, Pet. App. at 2a, n.2, the Fifth Circuit reasoned that "[p]roof of an adverse employment action is a requisite element of the plaintiffs' prima facie cases of discrimination and retaliation under Title VII and § 1981." Pet. App. at 2a. Like the district court, the court of appeals held that "under [Fifth Circuit] jurisprudence, an adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting and compensating." Under this strict test, the Fifth Circuit found that Petitioners' Title VII and Section 1981 claims were precluded because poor performance reviews and investigations do not constitute an "ultimate employment decision." Pet. App. at 2a. In regard to the discriminatory and retaliatory compensation claims, the Fifth Circuit affirmed summary judgment for Respondents, reasoning: "While . . . a complete *denial* of a pay increase may qualify as an ultimate employment decision, we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the requirement." *Id.* at 3a.[5]

This petition followed.

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[5] In so ruling, the Fifth Circuit did not consider numerous of Petitioners' arguments for reversal, including that the refusal to process Petitioner Cardenas-Garcia's grievance constituted an illegal discriminatory and retaliatory act, that the district court erred on statute of limitations grounds, that Respondents Burton and Marcy were not entitled to immunity, and that the district court violated summary judgment standards by deciding issues of disputed fact and ignoring record evidence. Pet. C.A. Br. at 32-47. Because Petitioners' claims were dismissed in full based solely on the outcome determinative "ultimate employment decision" test, Pet. App. at 2a-3a, these issues remain open to be determined on remand.

REASONS FOR GRANTING THE WRIT

This case presents two fundamental and recurring questions under Title VII. First, courts of appeals are entrenched in a long-lasting circuit split regarding the appropriate standard for determining what constitutes an actionable retaliation claim under 42 U.S.C. § 2000e-3(a). Second, the courts of appeals have issued conflicting decisions as to what constitutes actionable discrimination under 42 U.S.C. § 2000e-2(a). Review by this Court is thus plainly warranted to provide uniformity on these critical and frequently recurring questions that have profound implications for this landmark civil rights statute.[4]

Because the questions presented determine the rights of innumerable employees throughout the United States claiming discrimination and retaliation under Title VII, such a conflict is untenable. This case presents an ideal vehicle to resolve the questions presented because the Fifth Circuit's ruling on whether Respondents' acts constituted actionable discrimination or retaliation dictated the case's ultimate result. The types of undisputed discriminatory and retaliatory acts taken against Petitioners also makes this case an ideal vehicle for determining what, if any, differences exist between actionable discrimination and retaliation claims and for establishing the appropriate threshold for such claims. This case thus affords the Court a uniquely appropriate opportunity to settle these important yet unresolved statutory interpretation issues.

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[4] As noted above, the district court held that § 1981 allows claims for discrimination and retaliation alleged here under the standards set forth for Title VII claims. Pet. App. at 12a, n.5. That ruling was not challenged on appeal to the Fifth Circuit. Petitioners have framed the issues solely in terms of Title VII because upon remand the Title VII standards will be used to determine liability under § 1981.

I. Certiorari Should Be Granted To Resolve the Acknowledged and Intractable Circuit Split Over the Standard for What Constitutes Actionable Retaliation.

This Court's intervention is needed to resolve an acknowledged and intractable circuit split over the standard for what constitutes actionable retaliation in a Title VII suit under 42 U.S.C. § 2000e-3(a). The anti-retaliation provision of Title VII of the Civil Rights Act of 1964 prohibits an employer from "discriminat[ing] against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

A. The Courts of Appeals Are Intractably Divided Over the Question Presented and The Court's Intervention Is Needed To Resolve This Intolerable Circuit Split.

For ten years, the Fifth Circuit has insisted that the anti-retaliation provision forbids only those acts of retaliation that constitute what that circuit labels "ultimate employment decisions." *Dollis v. Rubin*, 77 F.3d 777, 782 (CA5 1995); *see also*, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (CA5), *cert. denied*, 522 U.S. 932 (1997). This is avowedly a strict interpretation of federal anti-retaliation statutes. *Burger*, 168 F.3d at 878. In the Fifth Circuits' view "ultimate employment decisions" are limited to acts "such as hiring, granting leave, discharging, promoting and compensating." Pet. App. at 2a. An employer may retaliate against an individual for protected activity so long as the method of retaliation does not involve an ultimate employment decision. As the district court in the instant case observed, the Fifth Circuit since 1995 has

identified a wide variety "laundry list" of retaliatory practices that it deems legal. Pet. App. at 41a-43a.[7]

As the Fifth Circuit and other courts and commentators have acknowledged, the circuits are split over the threshold of harm that must be alleged to prevail on a Title VII discrimination claim. For example, six years ago, the Fifth Circuit recognized that its "ultimate employment decision" rule is in conflict with most other circuits:

> Our court has analyzed [section 704(a)] in a stricter sense than some other circuits. . . . The Eleventh Circuit has recently discussed the circuit split surrounding the issue of whether Title VII's protection against retaliatory discrimination extends only to "ultimate employment decisions." . . . We are not alone, but we are in the minority.

Burger, 168 F.3d at 878 (CA5 1999); *see Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (CA11 1998) (expressly rejecting Fifth Circuit's interpretation of anti-retaliation provisions as "inconsistent with the plain language of [Title VII]"); Rosalle Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing*, 56 OKLA. L. REV. 623 (2003) ("[T]he circuit courts are divided as to how much harm an employee must endure before claims of disparate treatment or retaliation are actionable.") (hereinafter *"Parsing the Meaning of 'Adverse Employment Action'"*); Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an "Adverse Action" in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321 (2002) (noting that circuits

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[7] The Fifth Circuit has also held that the doctrine applies to claims under section 1981. *Foley v. University of Houston System*, 324 F.3d 310, 316-17 and n.2 (CA5 2003); *Felton v. Polles*, 315 F.3d 470, 486 (CA5 2002).

generally employ the term "adverse employment action" in such claims and that circuits generally agree that "actions such as hiring, discharge, compensation [and other major employment decisions] constitute adverse actions," but that they nonetheless "disagree about whether less egregious employment actions (i.e., poor performance evaluations, lateral transfers, intermediate acts of discipline and harassment) constitute adverse actions" under Title VII's retaliation prohibition).

The Ninth Circuit has summarized this inter-circuit conflict:

> The circuits are currently split as to what constitutes an adverse employment action [prohibited by section 704(a)]. . . . [C]ircuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits. . . .
>
> [T]he First, Seventh, Tenth, Eleventh and D.C. Circuits . . . all take an expansive view of the type of actions that can be considered adverse employment actions. . . . The Second and Third Circuits hold an intermediate position within the circuit split. They have held that an adverse action is something that materially affects the terms and conditions of employment. . . . The Fifth and Eighth Circuits, adopting the most restrictive test, hold that only "ultimate employment actions" such as hiring, firing, promoting and demoting constitute actionable adverse employment actions.

Ray v. Henderson, 217 F.3d 1234, 1241-42 (CA9 2000). In *Ray*, the Ninth Circuit adopted the position urged by the

EEOC, which administers Title VII,[8] holding that section 704(a) forbids *any* practice "reasonably likely to deter employees from engaging in protected activity." 217 F.3d at 1243.[9]

The Fourth Circuit has also acknowledged the problem, noting that even the position of the Eighth Circuit is not as extreme as that of the Fifth. The Fourth Circuit expressly rejected the rule in the Fifth Circuit.

> [T]he majority of circuits have either implicitly or explicitly rejected the "ultimate employment decision" standard in § 2000e-3 cases. . . . [W]hile the Eighth Circuit has ostensibly adopted the "ultimate employment decision" standard, it has consistently applied a broader standard. . . . [I]n *Mattern* . . . the Fifth Circuit expressly held insufficient the kind of discriminatory changes in the terms, conditions, and benefits of employment, which most other courts have recognized could constitute adverse employment action under § 2000e-3. . . . But "ultimate employment decision" is not the standard

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[8] The EEOC's position is found in *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8, at 14 (May 1998), at http://www.eeoc.gov/policy/docs/retal.pdf. The Manual indicates that "[t]he anti-retaliation provisions are exceptionally broad," and "set no qualifiers on the term 'to discriminate,' and therefore prohibit *any* discrimination that is reasonably likely to deter protected activity. They do not restrict the actions that can be challenged to those that affect the terms and conditions of employment." *Id.*

[9] This Court has repeatedly referred to the Manual when interpreting Title VII and provided them *Skidmore* deference. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting "these guidelines, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997) (holding that Title VII's anti-retaliation provision extends to former employees and giving weight to the EEOC's conclusion that allowing retaliation against former employees would "deter victims of discrimination from complaining to the EEOC.").

> in this circuit. . . . [W]e have expressly rejected distinctions, like those drawn by *Mattern*. . . .

Von Gunten v. Maryland, 243 F.3d 858, 864-65 (CA4 2001).

The Solicitor General likewise has acknowledged the circuit split in a brief before this Court: "The courts of appeals have articulated different standards for what types of employer conduct are actionable under 42 U.S.C. 2000e-3." *See Noland v. Henderson*, Case No. 01-1259, Brief for Respondent in Opposition, at 7; *see also id.* at 7-8 (citing cases rejecting Fifth Circuit's rule and acknowledging that EEOC has taken position that 42 U.S.C. § 2000e-3 prohibits any retaliatory conduct that is "reasonably likely to deter protected activity"), Solicitor General's brief is available at http://www.usdoj.gov/osg/briefs/2000/0responses/2000-1259.resp.html.

In addition to the Fourth, Ninth and Eleventh Circuits, which expressly noted the existence of this conflict in rejecting the Fifth Circuit's ultimate employment doctrine, other circuits have held that section 703(a) forbids retaliatory practices that are deemed lawful by the Fifth Circuit. *See, e.g., Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (CA1 1994) (holding that § 703(a) forbids not only ultimate employment actions, but also "actions such as . . . , disadvantageous transfers or assignments, . . . unwarranted negative job evaluations and toleration of harassment by other employees," all practices which are legal forms of retaliation in the Fifth Circuit); *Knox v. State of Indiana*, 93 F.3d 1327, 1334 (CA7 1996) (holding a retaliatory act is actionable so long as it causes significant injury and noting that the "law deliberately does not take a 'laundry list' approach [adopted by the Fifth Circuit] to retaliation, because unfortunately its forms are as varied as the human imagination will permit").[10]

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[10] *See also Smart v. Ball State Univ.*, 89 F.3d 437, 440 (CA7 1996) ("[a]dverse employment action has been defined quite broadly in this circuit"); *Collins v. State of Illinois*, 830 F.2d 692, 702-03 (CA7 1987)

(Continued on following page)

In addition to being outcome determinative, the circuit split over this issue is also deeply entrenched. On numerous occasions over the past ten years, the Fifth Circuit has had the opportunity to re-examine its ultimate employment decision test and bring itself in line with the majority of circuits, but has refused to do so. Instead, the Fifth Circuit has held fast to its minority interpretation that any Title VII discrimination claim must involve an "ultimate employment decision." Panel after panel has repeated the "ultimate employment action" language without ever looking for its statutory source. Only action by this Court can correct this now deep-seated misunderstanding. This Court's intervention is necessary because the courts of appeals' competing legal rules are well developed and are unlikely to converge in future litigation.

B. Certiorari Is Further Warranted Because This Issue Is Both Frequently Recurring and Important.

This Court should grant certiorari because the lower courts are frequently presented with Title VII and Section 1981 retaliation claims that require them to consider whether particular actions constitute "actionable retaliation." Under current law, these suits are governed by the severely conflicting and uncertain standards discussed above.

The issue of what constitutes "actionable retaliation" is frequently recurring, as the number of Title VII retaliation claims is substantial. Title VII applies not only to local, state, and federal government entities, 42 U.S.C.

("several courts have found an adverse job action, for purposes of discrimination or retaliation, in a lateral transfer even where the transfer did not result in a reduction of pay or benefits. Title VII does not limit adverse job action to strictly monetary considerations.") (footnotes omitted).

§ 2000e(a), but also to almost all "employers" in an "industry affecting commerce," 42 U.S.C. § 2000e(b), with fifteen or more employees. According to the EEOC, over twenty thousand Title VII retaliation claims were filed in fiscal year 2003. EEOC, "Charge Statistics FY 1992 Through FY 2003," *at* http://www.eeoc.gov/stats/charges.html.

The issue of what constitutes "actionable retaliation" is important because the question arises in numerous contexts. *See* Levinson, *"Parsing the Meaning of 'Adverse Employment Action,'"* 56 OKLA. L. REV. at 624-630 (collecting cases and listing areas where question arises most frequently).

Finally, this issue also is important in light of its broader implications for effective enforcement of the civil rights laws. This Court has emphasized that a central purpose of Title VII's anti-retaliation provision is to "maintain[] unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997); *see also*, *Flannery v. Recording Indus. Ass'n of America*, 354 F.3d 632, 642 (CA7 2004) ("The very purpose of the retaliation provisions is to prevent employers from deterring employees from exercising their rights, including the right to file a charge of discrimination."). Employer conduct that chills employees from exercising their rights to oppose discriminatory conduct in the workplace is particularly undesirable. Unfettered access to oppose employment discrimination is necessary because, without it, neither the EEOC nor private litigants can effectively enforce the anti-discrimination statutes. *See*, *e.g.*, 42 U.S.C. § 2000e-5(b) (Title VII enforcement begins with the filing of a charge); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090 (CA5 1987) ("The EEOC depends on the filing of charges to notify it of possible discrimination."). "If retaliation for [engaging in protected activity] were permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment

discrimination proceedings." EEOC Compliance Manual, at 1-2. Given that employees are often in the best position to observe and report discriminatory actions, allowing employers to chill the exercise of rights to oppose discrimination so long as such retaliatory actions do not amount to an "ultimate employment decision" the minority rule applied by the Fifth Circuit threatens to substantially curtail the effective enforcement of this landmark civil rights statute.

C. This Case Is An Ideal Vehicle for Determining the Standard for Actionable Retaliation.

Under the Fifth Circuit's strict standard, the court of appeals rejected three bases of retaliation that other circuits would have deemed actionable. The question of what constitutes actionable retaliation is therefore squarely outcome determinative in this case. Moreover, the case presents an ideal record on which to decide the question presented because each of the acts that Petitioners contend constitutes actionable retaliation is clearly established in the record and undisputed by Respondents.

First, Respondent Burton created a negative performance evaluation of Petitioner Cardenas-Garcia in 2000 in direct response to his complaint about discriminatory comments in the department's hiring process, comments that TTU's EEO officer and Assistant Provost confirmed were inappropriate. Pet. App. at 18a-19a. Though the Fifth Circuit held such "poor performance reviews" were not actionable under its strict standard, Pet. App. at 2a, several other circuits have stated that such "unwarranted negative job evaluations" can qualify as retaliatory acts. *Wyatt v. City of Boston*, 35 F.3d 13, 16 (CA1 1994); *see also Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (CA9 1987); *Cardenas v. Massey*, 269 F.3d 251, 263-64 (CA3 2001) (finding that negative performance evaluations contributed to a "hostile work environment" and the plaintiff had been subjected to an adverse employment action); *Cf. Kim*

v. Nash, 123 F.3d 1046, 1060 (CA8 1997) (holding that "reduction of duties, disciplinary action and negative personnel reports, as well as required remedial training, constituted adverse employment action" in retaliation claim). Had Cardenas-Garcia lived in one of these jurisdictions, he would have had a viable retaliation claim, but because he lived and worked in the Fifth Circuit, he did not.[11]

Second, Petitioners Cardenas-Garcia and Rasty were retaliated against when they received proportionately less pay raises after complaining of discrimination than other non-minority faculty. *See* Pet. App. at 54a, 65a-66a. The Fifth Circuit held that such disproportionate pay raises, even if enacted with retaliatory motive, did not constitute actionable retaliation because it did not constitute an "ultimate employment action." Pet. App. at 3a. It held that only a complete denial of a pay increase would qualify as an ultimate employment decision. In other circuits, a lesser pay raise constitutes actionable retaliation. *See Ray*, 217 F.3d at 1243-44 (holding disproportionate reductions in pay constituted retaliation in violation of Title VII).

Third, Petitioner Rasty suffered illegal retaliatory acts when Respondents Marcy and Burton initiated investigations of academic dishonesty against him and complained that Rasty was a disgruntled employee who should be denied access to a federal research project. Pet. C.A. Br. at 26. The district court found that the academic dishonesty

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[11] The Fifth Circuit did not rule on whether the failure to process Cardenas-Garcia's grievance on accordance with established standards constituted retaliation, but it would constitute actionable retaliation in the Seventh Circuit. *See EEOC v. Board of Governors of State Colleges & Universities*, 957 F.2d 424 (CA7 1992) (ruling that grievance process that provided grievance could be terminated if employee sought resolution in other forum, such as EEOC, violated anti-retaliation provision of ADEA); *Johnson v. Palma*, 931 F.2d 203 (CA2 1991) (union's refusal to proceed with Plaintiff's grievance after he filed race discrimination complaint with state agency constituted unlawful retaliation). This issue should be resolved on remand.

investigation did not have any adverse impact on Rasty's employment because it ultimately was dismissed (though it completely ignored the retaliatory attempt to interfere with Rasty's work on explosives), Pet. App. at 59a, and the Fifth Circuit affirmed, finding that such an investigation is not an "ultimate employment decision." Pet. App. at 2a. Yet, other circuits have recognized that the mere probability of adverse consequences can deter protected activity such that an employee need not trace an adverse employment action to an actual harm to employment; the potential or threat of such harm suffices to establish an employer's liability. *See Hashimoto v. Dalton*, 118 F.3d 671, 676 (CA9 1997) (negative job reference in retaliation for employment discrimination complaints constituted actionable retaliation even where plaintiff would not have been hired even in the absence of the negative recommendation). In such circumstances, the fact that the unlawful action "turned out to be inconsequential goes to the issue of damages, not liability." *Id.* at 676; *see also*, Levinson, *Parsing the Meaning of "Adverse Employment Action,"* 56 OKLA. L. REV. at 631 ("If the action taken by the employer is truly inconsequential, it will be difficult for an employee to prove bias; however, where the evidence indicates that the employer is basing its decisions on impermissible discrimination or retaliation, liability should attach, and the severity of the action should be addressed solely at the remedy stage."). And in contrast with the Fifth Circuit, the Ninth Circuit has determined that an adverse employment action is not expunged if an aggrieved employee is only threatened with, or subsequently obtains a reversal of, the retaliatory action. The retaliation or threatened retaliation itself constitutes a cognizable adverse employment action. *See, e.g., Hashimoto*, 118 F.3d at 676 (negative job reference qualified as adverse employment action even when it "turned out to be inconsequential"). Thus, had Rasty worked in the Ninth Circuit, he would have had an actionable claim, but because he worked in the Fifth Circuit, his claims were dismissed under the more strict "ultimate employment decision" standard.

This conflict is untenable. The anti-retaliation provisions of the statute should not be treated differently in different parts of the country. Either Title VII protects employees from these types of retaliatory actions, or it does not. Uniformity is essential on this central feature of Title VII. Public and private employers and employees alike are entitled to know what is the appropriate standard for determining what constitutes actionable retaliation. It is an intolerable state of affairs when employees in the Fifth Circuit are entitled to less protection for engaging in protected activity under Title VII than employees in other parts of the country, yet this circuit conflict creates precisely this result.

D. The Fifth Circuit's Decision Is Wrong on the Merits and Conflicts With Decisions of This Court.

The Fifth Circuit requires that the alleged retaliatory act be employment related. This is not supported by the text of the statute and conflicts with several circuits and guidance published by the EEOC, as noted above. Title VII's anti-retaliation provision says nothing about requiring an "adverse employment action." This language contrasts sharply with that of the general anti-discrimination provision, which makes it unlawful to discriminate with respect to an individual's "terms, conditions, or privileges of employment." *See* 42 U.S.C. § 2000e-2(a)(1); *see generally* EEOC Compliance Manual, § 8 at 14.

Unlike the general anti-discrimination provisions, the anti-retaliation provisions set no qualifiers on the term "to discriminate." Actionable retaliation therefore is not limited to discrimination in the "terms, conditions, or privileges of employment." EEOC Compliance Manual, § 8 at 14. The only requirement is that "any adverse treatment [be] based on a retaliatory motive and [be] reasonably likely to deter the charging party or others from engaging in protected activity." *Id.* This standard excludes "petty slights and trivial annoyances," as such matters are

unlikely to have a chilling effect. *Id.* However, it covers retaliatory conduct that is not employment-related. *See id.* at 14-15 (provisions bar "harassment in or out of the workplace").

Other courts have agreed with the EEOC that actionable retaliation need not involve employment-related conduct. In *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (CA10 1996), for instance, the Tenth Circuit found illegal retaliation under Title VII when the employer caused a coworker to file a criminal complaint against an employee who had filed a discrimination charge with the EEOC. The Tenth Circuit observed that "a statute which is remedial in nature should be liberally construed." *Id.* at 986 (internal quotations and citation omitted). Similarly, in *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (CA3 1999), the Third Circuit concluded that an employer's lawsuit against a former employee for breach of a non-competition agreement could constitute illegal retaliation under Title VII. The court rejected the employer's First Amendment argument "in part because the prohibition on retaliation is so explicit and the public policy behind the retaliation provision so compelling." *Id.* at 157. The Seventh Circuit also took a broad view of the anti-retaliation provisions in *Aviles v. Cornell Forge Co.*, 183 F.3d 598 (CA7 1999), where the court held that the plaintiff had stated a valid claim for retaliation under Title VII when he alleged that his employer had falsely told local police that he had threatened his supervisor with a gun. *See id.* at 606. The Court noted that "the language of the Title VII retaliation provision is broad enough to contemplate circumstances where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting his Title VII rights." *Id.*; *cf. Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740, 749 (1983) (holding that employer's lawsuit may constitute illegal retaliation under the NLRA and observing that "[a] lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation"). The Seventh Circuit adhered to this position

in *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (CA7 2003), when it stated that adverse action "will not always be employment-related" but the employee must show "real harm." *Ibid.* (citing *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745-46 (CA7 2002)).

Second, even if the retaliatory act needs to have a nexus to employment, the Fifth Circuit errs in requiring that the act be an "ultimate employment act." Like the broader "employment action" requirement, the ultimate employment decision doctrine finds no support in the statutes. The *Mattern* panel, over a blistering dissent by Judge Dennis, purported to find a statutory basis for the doctrine by linking interpretation of Title VII's anti-retaliation provision, § 704(a), to interpretation of one of the statute's general anti-discrimination provisions, § 703(a)(1). *See id.* at 708-09. This, however, was a mistake. As discussed above, the anti-retaliation provision and the general anti-discrimination provision do not use similar language; rather, the anti-retaliation provision broadly precludes "discriminat[ion]" against an individual because of his or her protected activity, while the anti-discrimination provision makes it unlawful only to discriminate regarding an individual's "compensation, terms, conditions or privileges of employment." Compare 42 U.S.C. § 2000e-3(a) with *id.* § 2000e-2(a)(1). The term "discrminate[]" means "differential treatment." BLACK'S LAW DICTIONARY 500 (8th Ed. 2004). The lack of qualifying language in the anti-retaliation provision therefore means that this section provides broader coverage than the general anti-discrimination provision.

This Court's cases since *Mattern* have suggested that even if *Mattern* was correct in linking interpretation of section 704(a) to interpretation of section 703(a)(1), the Fifth Circuit still is reaching the wrong result. Two recent sexual harassment cases, for instance, have clarified that the "discrimination" prohibited by section 703(a)(1) necessarily refers to more than "ultimate employment decisions." In *Faragher v. City of Boca Raton*, 524 U.S. 775

(1998), the Court said, "We have repeatedly made clear that although the statute mentions specific employment decisions with immediate consequences, the scope of the prohibition is not limited to 'economic' or 'tangible' discrimination, and that it covers more than 'terms' and 'conditions' in the narrow contractual sense." *Id.* at 786 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), and *Oncale v. Sundowner Offfshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998) (some internal quotations omitted)). Thus, the Court explained, § 703(a)(1) prohibits hostile environment sexual harassment. *Id.* (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

The Court also cast doubt on *Mattern* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). There, the Court said that an employer is vicariously liable for a supervisor's sexual harassment, but that the employer may raise an affirmative defense to liability if the harassment has not resulted in a "tangible employment action." *Id.* at 765. By recognizing that section 703(a)(1) prohibits sexual harassment even when the harassment does not result in a tangible employment action, the Court necessarily rejected *Mattern*'s interpretation of the section as covering only "ultimate employment decisions." *See generally* Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 382-84 (1999). Since *Mattern* was wrong in interpreting section 703(a)(1) to require an ultimate employment action, its derivative interpretation of section 704(a) cannot stand.

Another case decided by this Court, also issued after *Mattern*, confirms that the Fifth Circuit erred in restricting Title VII's anti-retaliation provision to "ultimate employment decisions." In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court held that Title VII protects former employees from retaliation. *See id.* at 346. Because an employer no longer has an employment relationship

with a former employee, it is no longer in a position to make any "ultimate employment decisions" regarding that individual. Indeed, in *Robinson*, the alleged retaliation consisted of a negative employment reference. *See id.* at 337. A negative reference, standing alone, is much like a negative performance evaluation. It is not, of itself, an ultimate employment decision. A prospective employer who reads the negative reference is free to ignore it. Under *Mattern*, therefore, the retaliatory issuance of a negative reference would not be cognizable. *See Mattern*, 104 F.3d at 708. Nevertheless, although the Court did not rule on the question, it gave no suggestion that issuing a negative employment reference was insufficient to support a retaliation claim. The logical inference from the Court's unanimous opinion is that employers may be sued for conduct that falls short of an "ultimate employment decision."

This Court's emphasis on the broad reach of section 703(a)(1), and its refusal to limit that section to "economic" or "tangible" discrimination, cannot be squared with *Mattern*'s holding that the provision addresses only "ultimate employment decisions." It is difficult to imagine an action without "economic" or "tangible" consequences that the Fifth Circuit would view as an ultimate employment decision, yet clearly the statute covers at least some such conduct.

II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Conduct Constitutes Actionable Discrimination Under 42 U.S.C. § 2000e-2.

The Fifth Circuit's decision that discriminatory performance review, investigations and pay raises do not amount to "ultimate employment decisions" creates a circuit conflict on what constitutes actionable discrimination under 42 U.S.C. § 2000e-2(a).

A. The Fifth Circuit's Decision Is Wrong on the Merits and Creates a Circuit Conflict.

Title VII of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

The Fifth Circuit's holding in this case that a denial of pay raise would constitute actionable discrimination, but a discriminatory performance review that leads to a lesser raise is not an "ultimate employment decision" cannot be squared with the language of the statute. Pet. App. at 2a-3a. The plain language of the statute prohibits discrimination in "compensation" and "terms and conditions and privileges of employment." It is not limited to denials of pay.

The Fifth Circuit's decision also conflicts with a recent decision from the Eleventh Circuit. Relying on the plain language in the statute that prohibits an employer to discriminate against an individual with respect to "compensation" based on race or national origin, the Eleventh Circuit has held "that an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII." *See Gillis v. Georgia Dep't of Corrections, et al.*, ___ F.3d ___, 2005 U.S. App. LEXIS 2924, at *15; Case No. (CA11 Feb. 18, 2005). Thus, had Cardenas-Garcia and Rasty worked in the Eleventh Circuit, they would have had actionable discrimination claims, but because they worked in the Fifth Circuit they do not. Having employee's right determined by where they live, rather than by a uniform standard set by

congress as interpreted by this Court, is untenable. This Court should grant certiorari to resolve this circuit split.

B. Review Is Warranted Because The Decision Below Conflicts With This Court's Decision in *Bazemore v. Friday*.

Certiorari is also warranted because the Fifth Circuit's holding is contrary to this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), in which the Court held that discriminatory pay differences between employees based on race constituted actionable discrimination, even if such pay discrepancies started before the effective date of Title VII. *Ibid.*, at 395-96 ("[e]ach week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."). The Court's opinion was not limited solely to a denial of pay raises – it struck at the heart of all compensation decisions and requires similarly-situated employees not to be discriminated against in each pay check.

Yet, under the Fifth Circuit's holding, similarly-situated employees can be discriminated against in each paycheck by granting discriminatory raises, so long as they are not denied a raise. This is contrary to the *Bazemore* decision. To allow the Fifth Circuit's decision to stand would allow employers to discriminate against whole groups of employees based on race, national origin or other protected characteristics by giving them a $1 raise, while granting other groups of employees more substantial raises. Thus, discriminatory compensation decisions actually would grow over time. This cannot comport with Congressional intent on enacting Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2005

UNITED STATES COURT OF APPEALS

for the Fifth Circuit.

No. 04-10224

JAIME CARDENAS-GARCIA; JAHAN RASTY,

Plaintiffs-Appellants,

VERSUS

TEXAS TECH UNIVERSITY; THOMAS BURTON, individually and in his official capacity as Chair of the Mechanical Engineering Department at Texas Tech University; and WILLIAM MARCY, individually and in his official capacity as Associate Dean and later Dean of the College of Engineering at Texas Tech University,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
03-CV-029-C

(Filed December 14, 2004)

Before REAVLEY, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellants Jaime Cardenas-Garcia (Cardenas-Garcia) and Jahan Rasty (Rasty) sue their former employer, Texas Tech University (TTU) and their former supervisors, Thomas Burton (Burton) and William Marcy (Marcy), both in their individual and official capacities, under Title VII and 42 U.S.C. §§ 1981 and 1983 for employment discrimination based on national origin and retaliation. The district court dismissed both plaintiffs's claims against all defendants. We affirm for the following reasons.

In plaintiffs' actions against TTU under Title VII and against Burton and Marcy under § 1981, plaintiffs failed to produce summary judgment evidence from which a factfinder could infer that either plaintiff suffered an adverse employment action at the hands of any defendant. Proof of an adverse employment action is a requisite element of the plaintiffs' prima facie cases of discrimination and retaliation under both Title VII and § 1981.[2] Plaintiffs allege that poor performance reviews and disciplinary investigations constitute adverse employment actions. Under our jurisprudence, an adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting and compensating. *See Foley v. University of Houston System*, 355 F.3d 333, 340 (5th Cir. 2003). Performance reviews and investigations, therefore, do not qualify as ultimate employment actions.

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[2] *See* Order of the District Court, R. 01643 (laying out the prima facie case for national origin discrimination/disparate treatment under Title VII), R. 01645 (detailing the prima facie case for retaliation under Title VII), and *Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000) (Stating that both § 1981 and Title VII are analyzed under the Title VII evidentiary framework).

Plaintiffs, do, however, also argue that they both received proportionately lesser pay increases than did other, Anglo professors on the faculty. While this court has held that a complete *denial* of a pay increase may qualify as an ultimate employment decision, we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the requirement. *See Fierros v. Texas Department of Health*, 274 F.3d 187, 193 (5th Cir. 2001).

For the above reasons, we AFFIRM the district court's grant of summary judgment in favor of all defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JAIME CARDENAS-GARCIA AND JAHAN RASTY, Plaintiffs,	)	Civil Action No. 5:03-CV-029-C
v.	)	
TEXAS TECH UNIVERSITY, Defendant.	)	

ORDER

(Filed Jan. 22, 2004)

On this date the Court considered Texas Tech University's ("Defendant TTU") Motion for Summary Judgment filed December 15, 2003. Plaintiffs' Response to Defendant TTU's Motion was filed January 6, 2003, by Jaime Cardenas-Garcia ("Plaintiff Cardenas-Garcia") and Jahan Rasty ("Plaintiff Rasty") (collectively "Plaintiffs"). Defendant TTU filed its Reply on January 15, 2004. After considering all the relevant arguments and evidence, this Court **GRANTS** Defendant TTU's Motion for Summary Judgment.

I.

FACTUAL BACKGROUND

Plaintiffs allege employment discrimination based on their national origins, hostile working environment, and retaliation. Plaintiffs claim they suffered salary disparity, ethnic slurs, and other acts of discriminatory treatment at

the hands of the Chair of Defendant Texas Tech University's Department of Mechanical Engineering (Defendant Burton), the Associate Dean/Dean of Defendant TTU's College of Engineering (Defendant Marcy), and Defendant TTU.

Plaintiffs bring suit against Defendants for alleged national origin discrimination, harassment, and retaliation under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and under 42 U.S.C. § 1981; and for violations of Plaintiffs' due process rights under 42 U.S.C. § 1983.

Plaintiffs seek declaratory relief, injunctive relief, actual damages, exemplary damages, prejudgment interest, postjudgment interest, attorneys' fees, and such other relief as this Court deems just.

The Court adopts the factual background contained in its order of summary judgment relating to qualified immunity; and for the sake of brevity, it need not be repeated again here.

II.

PROCEDURAL BACKGROUND

On May 15, 2003, Plaintiffs sought leave of this Court to amend their complaint and add Defendants Burton and Marcy as named defendants. The Court granted the request and Plaintiffs' First Amended Complaint was filed June 6, 2003. Defendants' First Amended Answer and Affirmative Defenses was filed June 18, 2003. Defendant Texas Tech's Partial Motion to Dismiss was granted by an order from this Court on August 6, 2003, which dismissed Plaintiffs' claims against Defendant Texas Tech based on

§§ 1981 and 1983 as being barred by the Eleventh Amendment. Defendants Burton and Marcy filed their Motion for Summary Judgment on October 17, 2003. Plaintiffs filed their Response on November 6, 2003. Defendants Burton and Marcy filed their Reply on November 21, 2003. This Court granted Defendants Burton's and Marcy's motion based upon limitations and qualified immunity in an Order dated January 20, 2004. As stated above, Defendant TTU filed the motion now before the Court on December 15, 2003. Plaintiffs' Response to Defendant TTU's Motion was filed January 6, 2003. Defendant TTU filed a Reply on January 15, 2004.

III.

STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255.

Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time

for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman,* 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile,* 10 F.3d 1093, 1097 (5th Cir. 1993). Affidavits, or portions thereof, that are not based on personal knowledge or that are based merely on information and belief cannot be considered in deciding a motion for summary judgment. *Richardson v. Oldham,* 12 F.3d 1373, 1378-79 (5th Cir. 1994). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson,* 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* The court will not, "in the absence of any proof, assume that the non-moving party could or would prove the necessary facts." *McCallum Highlands v. Washington Capital Dus, Inc.,* 66 F.3d 89, 92 (5th Cir. 1995), *as modified,* 70 F.3d 26 (5th Cir. 1995).

A moving party may meet the burden of proving no genuine issue of material fact by showing there is an absence of evidence to support the non-moving party's case. *Celotex,* 477 U.S. at 325. It is the non-moving party's burden to show triable issues of fact as to matters on which it bears the burden of proof at trial. A complete failure to prove an essential element of a non-moving party's case renders all other facts immaterial. *Id.* at 323. However, it is not enough to make conclusory allegations

that the opposing party has no evidence. *Id.* at 326; *Ashe v. Corley,* 992 F.2d 540, 543-44 (5th Cir. 1993). The moving party must identify the specific issue or issues on which it claims the opposing party has no supporting evidence and demonstrate that absence. For example, a moving party may offer admissions and responses to discovery to prove there is no genuine issue of material fact. *See Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1195 (5th Cir. 1986).

Finally, in reviewing the summary judgment evidence, "Rule 56 does not impose upon this Court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment" *Ragas v. Tenn. Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998). Nor does a court have a duty to search the record for triable issues. *Id.* Rather, the Court need rely only on those portions of the submitted documents to which the nonmoving party directs the Court's attention. *Id.* The party opposing summary judgment is required to articulate the precise manner in which the evidence supports his or her claim. *Id.* Moreover, Local Rule 56.5(c) expressly requires that a party filing an appendix "must include in its brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence."[1] A party may not rely upon "unsubstantiated assertions" as competent summary judgment evidence. *Id.* at 458.

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[1] The Court was unable to locate some of appendix material cited to by Plaintiffs. The Court double checked its copy of Plaintiffs' Appendix to Brief in Opposition with the original filed with the Clerk's office and both contained the same errors. It appears that some tabs were missing, some tabs were out of order, and some materials were missing.

IV.

DISCUSSION

As stated in this Court's prior order of August 6, 2003, "[t]his Court has long held that Defendant TTU is an arm of the State of Texas and, thus, Defendant TTU is, and its individual officials sued in their official capacities are, immune under the Eleventh Amendment to monetary suits based on §§ 1981 and 1983." *See Henry v. Tex. Tech Univ.*, 466 F. Supp. 141, 146 (N.D. Tex. 1979). Thus, Plaintiffs' contention that Defendant TTU did not specifically address Plaintiffs' due process allegations in Defendant's Motion for Summary Judgment are somewhat puzzling. Plaintiffs' claims for due process violations must be brought against state actors through § 1983. *See* 42 U.S.C. § 1983. As stated, this Court previously dismissed Plaintiffs' claims for monetary damages against Defendant TTU based on § 1983; thus, the Court need not address Plaintiffs' contention that Defendant did not address those claims.

However, the Court is well aware that Plaintiffs' Amended Complaint also seeks declaratory and injunctive relief for alleged violations of Plaintiffs' due process rights. Defendant TTU addressed these claims in its Reply to Plaintiffs' Response. Because this Court previously found that no violations of Plaintiffs' due process rights had occurred through the Defendants Burton and Marcy, logically there can be no declaratory or injunctive relief required. The State, or a subdivision thereof (such as Defendant TTU), can act only through its employees. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 762-65 (1998) (employer is liable for any employment actions by its supervisors).

As to Plaintiffs' procedural due process claims, "[t]he constitutional right to due process is not, however, an abstract right to hearings conducted according to fair procedural rules. Rather, it is the right not to be deprived of life, liberty, or property without such procedural protections." *Monk v. Huston,* 340 F.3d 279, 282-83 (5th Cir. 2003); *see Baldwin v. Daniels,* 250 F.3d 943, 946 (5th Cir. 2001) ("To bring a procedural due process claim under § 1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest."). The Court previously found in its prior order related to qualified immunity that 1) neither Plaintiff suffered the deprivation of a protected interest and 2) no deprivation occurred without procedural protections.[2]

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[2] Plaintiff Rasty complains of alleged procedural due process violations. As stated in this Court's prior order on qualified immunity, Rasty's constitutional due process rights were not violated.

> As [to] the UTAC's discussion of possible bias by the Provost and others in the process, appearance of bias by faculty members who recommend termination of tenured professor does not violate due process rights. *Levitt v. Univ. of Texas at El Paso,* 759 F.2d 1224 (5th Cir. 1985).... Moreover, there is not a violation of due process every time a university violates its own rules and procedures unless the action violates federal constitutional grounds. *See Levitt,* 759 F.2d 1224; *Brown v. Texas A&M Univ.,* 804 F.2d 327 (5th Cir. 1986) (failure of a state agency to comply with its internal regulations is insufficient to establish a violation of due process).... Finally, because of the multiple layers of process provided to Rasty, the Court finds that the risk of erroneous deprivation of his job was minimal. The low risk of an erroneous final decision being made "further erodes [a plaintiff's] claim that he deserved more process." *Williams v. Texas Tech Univ. Health Sciences Ctr.,* 6 F.3d 290, 293 (5th Cir. 1993) (a district court properly grants summary judgment on all procedural due process claims upon a finding

(Continued on following page)

Beyond Plaintiffs' speculation that their respective complained-of incidents involved a deviation from fair procedural rules, they have not shown a constitutional violation of due process. Nor have they shown a substantive due process violation.

In Plaintiffs' Response, they also complain that Defendant's motion failed to address other facts imputing liability. However, Defendant TTU's Motion for Summary Judgment addressed only those claims that Defendant perceived as possibly occurring within the applicable limitations period.[3] Plaintiffs also assert that Defendant

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that the risk of erroneous deprivation is minimal). In any event, this Court finds that Plaintiff Rasty received all the process due him.

Order filed Jan. 20, 2004, p. 43-44.

Plaintiff Rasty also complains of substantive due process violations in the amount of his pay raises. Cardenas-Garcia did not specifically plead such a cause of action, but even if he had, no violation exists for either Plaintiff. Plaintiff did receive pay raises, he simply contends that the amounts were inadequate. Moreover, there is a limitations problem for any pay raises given more than two years prior to the filing of this suit. A dispute over the quantum of pay increases is not actionable, especially when nothing in the record shows that the defendant was obligated to give the same dollar amount or same percentage increase to each professor. *See Harrington*, 118 F.3d at 366; *see also Williams*, 6 F.3d at 293 (a professor's interest in a specific level of income does not outweigh the state's significant interest in having reasonable discretion). Order filed Jan. 20, 2004, p. 46-47.

[3] Most of the complained-of "ignored factual scenarios" were previously found by this Court to (1) have been time-barred or (2) have not been actionable due to Plaintiffs' failure to make a prima facie case or overcome proffered nondiscriminatory reasons. Additionally, conclusory allegations without adequate support in the record are not competent summary judgment evidence and thus need not be addressed by the Defendant.

(Continued on following page)

failed to address whether Plaintiff Cardenas-Garcia was constructively discharged. This Court has previously found in its prior order relating to qualified immunity that Plaintiff Cardenas-Garcia was not constructively discharged; thus, Defendant need not have addressed this issue in its motion for summary judgment[4] As to Plaintiffs' other assertions in their response to Defendant's motion, this Court has already addressed those allegations as well in its prior order. Thus, pursuant to the prior discussion on those matters and this Court's prior findings, the Court is of the opinion that summary judgment is proper.

Plaintiffs also brought allegations of Title VII violations by Defendant. This Court has previously determined that Plaintiffs either (1) failed to make a prima facie showing of discrimination, hostile work environment, or retaliation that would be actionable,[5] or (2) failed to overcome legitimate, nondiscriminatory reasons for the

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This Court has found in its prior order relating to qualified immunity that the continuing-violation doctrine is not applicable to the circumstances of this case.

[4] Plaintiff Cardenas-Garcia complains that he suffered constructive discharge. This Court reiterates its prior finding that Plaintiff has offered no competent summary judgment evidence to support his claims of constructive discharge. Plaintiff Cardenas-Garcia testified that after his sabbatical, he made no effort whatsoever to return to work for Defendant TTU, but instead took a higher-paying job at the University of Maryland. The circumstances do not show that Plaintiff had found conditions so intolerable that he felt compelled to resign. This Court finds that conditions were not so intolerable that a reasonable employee would feel compelled to resign. *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001).

[5] This Court is not persuaded that Plaintiffs suffered an adverse employment action as required by the prima facie elements of discrimination. *See Mota v. Univ. of Tex. Houston Health Science Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001).

alleged conduct. Because this Court's prior discussion in its order on qualified immunity found that there were no violations for discrimination, hostile work environment, or retaliation under § 1981, it stands to reason that there can be no violations under Title VII. *See Flanagan v. Aaron E. Henry Cmty. Health Servs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir. 1989) (elements of claims alleging violations of § 1981 and Title VII are identical); *Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000) (employment discrimination claims brought under § 1981 are analyzed under the same evidentiary framework as Title VII claims).

CONCLUSION

For the stated reasons above, after considering all the arguments and evidence, and because the Court finds the arguments raised in Defendant TTU's motion to be meritorious and well-taken, the Court **GRANTS** Defendant Texas Tech University's Motion for Summary Judgment.

SO ORDERED this 22nd day of January, 2004.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JAIME CARDENAS-GARCIA and JAHAN RASTY, Plaintiffs, v. TEXAS TECH UNIVERSITY; THOMAS BURTON, individually and in his official capacity as Chair of the Mechanical Engineering Department at Texas Tech University; and WILLIAM MARCY, individually and in his official capacity as Associate Dean and later Dean of the College of Engineering at Texas Tech University, Defendants.	)	Civil Action No. 5:03-CV-029-C

ORDER

(Filed Jan. 20, 2004)

On this date the Court considered Defendants Thomas Burton ("Defendant Burton") and William Marcy's ("Defendant Marcy") (collectively "Individual Defendants") Motion for Summary Judgment and Brief in Support filed October 17, 2003. Plaintiffs' Response was filed November 6, 2003, by Jaime Cardenas-Garcia ("Plaintiff Cardenas-Garcia" or "Cardenas-Garcia") and Jahan Rasty ("Plaintiff Rasty" or "Rasty") (collectively "Plaintiffs"). After considering all the relevant arguments and evidence, this Court **GRANTS** the Individual Defendants' Motion for Summary Judgment.

I.

FACTUAL BACKGROUND

Plaintiffs allege employment discrimination based on their national origins, hostile working environment, and retaliation. Plaintiffs claim they suffered salary disparity, ethnic slurs, and other acts of discriminatory treatment at the hands of the Chair of Defendant Texas Tech University's ("TTU") Department of Mechanical Engineering (Defendant Burton), the Associate Dean/Dean of Defendant TTU's College of Engineering (Defendant Marcy), and Defendant TTU.

Plaintiffs bring suit against Defendants for alleged national origin discrimination, harassment, and retaliation under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and under 42 U.S.C. §§ 1981; and for violations of Plaintiffs' due process rights under 42 U.S.C. § 1983.

Plaintiffs seek declaratory relief, injunctive relief, actual damages, exemplary damages, prejudgment interest, postjudgment interest, attorneys' fees, and such other relief as this Court deems just.

In their Motion for Summary Judgment, Defendants state certain grounds for summary judgment. Specifically, Individual Defendants Burton and Marcy seek summary judgment based on limitations and qualified immunity. The Individual Defendants state that "Plaintiffs have sued Individual Defendants alleging retaliation, national origin discrimination and due process deprivations pursuant to §§ 1981 and 1983. The Individual Defendants assert that most of the incidents alleged by Plaintiffs took place outside of the statute of limitations." *See* Def. M. at 1.

Defendants Burton and Marcy go on to state that "[t]hose incidents should be dismissed for that reason alone." The Individual Defendants further claim that "[e]ach Plaintiff has failed to assert a violation of a clearly established constitutional right by either of the Individual Defendants, and both have failed to establish that the alleged actions were not objectively reasonable under the standards set forth by the Fifth Circuit." This second defense is a defense based on qualified immunity. Within the second defense of qualified immunity, the Individual Defendants in their Reply also appear to assert that Plaintiffs have failed to make their prima facie case of discrimination and have not shown the reasons advanced by the Defendants to be pretextual.

Plaintiff Cardenas-Garcia

Plaintiff Cardenas-Garcia is a foreign-born (Ecuadorian) citizen of the United States formerly employed by Defendant TTU as a tenured full professor in Defendant TTU's Mechanical Engineering Department ("MED"). He began working in the MED in 1988 as an assistant professor. In 1989, Cardenas-Garcia received a monetary award and recognition for teaching effectiveness. He alleges that an Anglo professor received a different and larger award from the same committee. In 1991, Cardenas-Garcia received a three-year evaluation which he disagreed with because, in his opinion, it contained subjective opinions. Cardenas-Garcia believed the evaluation he received was tied to his national origin, but he presented no evidence to support his conclusion. In 1993, Cardenas-Garcia applied for and was granted tenure.

In 1995, Defendant Burton was hired as Chair of MED. Plaintiffs allege that Burton made a statement during his interviews for the position that one of the weaknesses of the graduate program was that it had a large percentage of foreign students and that he repeated the statement on two other occasions, one of which was in a memo sent on March 24, 1998, to all the faculty within the department. However, the memo does not actually refer to foreign students but rather only states a goal of improving the reputation to a level that would allow the department to attract quality U.S. Ph.D. students. Cardenas-Garcia concedes in his deposition that there is nothing inherently discriminatory in such a statement.

Also in 1998, Cardenas-Garcia applied for and was promoted to the status of full professor. Cardenas-Garcia, however, believes he was treated differently in getting his promotion, even though he did in fact receive the promotion and a salary increase. Cardenas-Garcia alleges that Defendant Burton did not support him in his promotion with regard to letters of recommendation. However, Plaintiff Cardenas-Garcia provides no evidence to show that Defendant Burton was required to write letters of recommendation for anyone or that Burton owed Cardenas-Garcia some type of duty in that regard.

Cardenas-Garcia allegedly filed an internal grievance in either 1999 or 2000 relating to his annual review, which consisted of such criteria as research, teaching, and service. He believed his teaching was not credited enough. The record reveals that Cardenas-Garcia's teaching evaluations turned in by the students consistently gave him low marks, well below the average.

He also filed an EEOC complaint in 2000 alleging discrimination and retaliation. He alleges that similar teaching evaluations led to different results. Another Anglo faculty member who also had low student evaluations (though not as low as Cardenas-Garcia's) received a better annual evaluation. The Defendants assert that the Anglo faculty member's more favorable evaluation was based in large part on his research, publications, and the raising of research funding for the department. At some point in time following the poor evaluation, Cardenas-Garcia was assigned two new classes to teach. He contends that Defendant Burton would not have given the new assignments if his teaching was in fact of poor quality. However, the Defendants assert that such assignments had nothing to do with Plaintiff's teaching ability but rather the new class assignments occurred because of class shifting and schedule changes that often happen in university settings.

In 1999 another faculty member was alleged to have made the statement: "This department is a lumpy melting pot. I will reject all candidates whose names I cannot pronounce. Just kidding." Cardenas-Garcia alleges that he reported the statement to Defendant Burton because Burton was the Chair of the Department. Following Cardenas-Garcia's complaint to Burton, an EEO officer and the Associate Provost were present at the next meeting, presumably at Defendant Burton's request, and they informed the faculty members that such comments were inappropriate. Cardenas-Garcia admits to being pleased with the response. Cardenas-Garcia further alleges that the same professor received a better evaluation in his annual review than Cardenas-Garcia. Burton included a comment in Cardenas-Garcia's annual evaluation that

Cardenas-Garcia caused "unnecessary disputes between himself and other committee members, resulting in unnecessary impediments to the search process." Cardenas-Garcia felt this statement was subjective, unwarranted, and in retaliation for his reporting the "lumpy melting pot" comment by the other faculty member. No evidence was presented to support Cardenas-Garcia's subjective belief.

Cardenas-Garcia also complains of comments allegedly made two or three times over the years by another faculty member beginning in the early 1990's. Cardenas-Garcia alleges that the faculty member at meetings would state, "This is the white section," in reference to seating. Some faculty members thought the comment to be a joke. Deposition testimony states that the statements were regarded as occurring sporadically only a few times over the years. Moreover, no evidence was presented that shows how Defendant Burton was involved in or made aware of the statements. Nor was any evidence presented to show how Defendant Marcy may have been involved in or made aware of those statements.

A different faculty member is also alleged to have stated in 1995 that "minorities take jobs from white men" during a committee meeting. Cardenas-Garcia alleges that this statement was made in front of Defendant Burton. The record reveals that the faculty member was voicing his opinion in opposition to affirmative action after a question was posed to him on the subject.

Plaintiff Cardenas-Garcia alleges that the Defendants violated his due process rights and discriminated against him by delaying the grievance procedure which he had filed against Defendant Burton. The grievance, apparently

filed in 2000, dealt with issues regarding Cardenas-Garcia's annual review, salary, and alleged discrimination. The proceedings were put on hold in order to give mediation and/or settlement prospects an opportunity to work. Defendants counter that Defendant Marcy offered to cover the mediation fee out of departmental funds. Several e-mails were sent between the parties regarding mediation of the grievance. Also during this period, Cardenas-Garcia was out of the state on sabbatical to the University of Maryland. The record reveals that Cardenas-Garcia accepted employment at the University of Maryland and never actually returned to teach at Texas Tech. The record further shows that the parties tried to negotiate a mediation setting, but the Defendants allege that Cardenas-Garcia left the state before the mediation could be set up. There was disagreement as to where to conduct the mediation and what allegations would be mediated. Cardenas-Garcia felt he could not get a fair mediation in west Texas because of the allegedly discriminatory atmosphere. Defendant Burton refused to mediate the discrimination allegation, instead agreeing only to mediation of the annual review and salary issues. The Defendants contend that Cardenas-Garcia never let them know that he wished to continue the grievance and that they believed the matter to be moot because Cardenas-Garcia had been absent during the period and never actually returned to teach at Texas Tech University.

Plaintiff Cardenas-Garcia resigned from Texas Tech at the beginning of the fall 2002 semester and began teaching at the University of Maryland for approximately $10,000.00 more per year. While at Texas Tech, Cardenas-Garcia never received a pay cut; nor does he complain of failure to receive pay raises given in years when budget

constraints did not prevent pay raises. Cardenas-Garcia only complains that he believes he did not receive an adequate amount of pay raise when given and alleges the reasons for his lower pay raises were discriminatory; the Defendants claim the reasons consisted of valid performance issues. Cardenas-Garcia's position at the University of Maryland is currently not tenured.

Plaintiff Rasty

Plaintiff Rasty is a foreign-born (Iranian) citizen of the United States who is currently employed by Defendant TTU as a tenured professor in Defendant TTU's MED. For the period 1988 through 1995, Plaintiff Rasty does not believe that he was subjected to any type of discrimination at Texas Tech.

In 1994, Rasty was one of the professors in the MED who signed a letter of no confidence in the former Chair of the MED. Plaintiffs allege that when the former Chair stepped down, he stated that he felt "betrayed" and that "there are some Middle-Eastern minds in this department who have to be dealt with." Defendant Marcy was the person responsible for finding a new Chair of the MED. Plaintiffs allege that Defendant Marcy allegedly told Defendant Burton (who was selected as the new Chair) to clean up and take control of the MED. In a subsequent grievance hearing, Rasty alleges that Defendant Marcy accused him and two other foreign-born, minority professors of being responsible for the bad atmosphere within the MED.

Plaintiff Rasty complains of some of the same incidents complained of by Plaintiff Cardenas-Garcia. As stated above, Plaintiffs allege that Defendant Burton

stated on three occasions that a weakness of Texas Tech's graduate program was that it had a large percentage of foreign students. Rasty also complains of the statements made by an Anglo faculty member in 1999 that "[t]his department is a lumpy melting pot. . . . I will reject all candidates whose names I cannot pronounce. Just kidding." Rasty admits in his deposition that he does not know if the professor was ever actually reprimanded or not. However, as stated above, the record reveals that Defendant Burton, once complained to by Plaintiff Cardenas-Garcia, did in fact have the comment addressed by the Assistant Provost and an EEO officer at the next meeting. Rasty further admitted in his deposition that he does not have any evidence that would show Defendant Marcy was aware of the comments, nor did Rasty ever complain about the comments. Rasty, like Cardenas-Garcia, also complains of another faculty member's comment related to affirmative action that "women and minorities take jobs from white men." Rasty alleges that this professor made the comment to him on other occasions. However, Rasty admits in his deposition that a professor is entitled to his opinion on the subject of affirmative action.

In 1996, Plaintiff Rasty traveled to France to present a paper at a symposium. Rasty alleges that he purchased an excursion rate ticket that had a value of $0 printed on the receipt. When Rasty returned from the symposium, he requested $1,600.00 in reimbursement for his airfare to France. Rasty alleges that he paid $1,600.00 for the ticket. Rasty submitted travel reimbursement forms for expenses that were not documented. Burton refused to reimburse Rasty. Plaintiff Rasty filed a grievance against Burton in the belief that Defendant Burton was treating him

unfairly not only in the reimbursement incident but also in salary increases. A committee was convened and Rasty was allowed to put on evidence. The grievance committee determined that Rasty should be reimbursed for meals and hotel expenses but not for the airline ticket. Rasty's deposition reveals that the grievance committee also determined that no evidence existed to support the allegations that Defendant Burton was treating him unfairly in regard to salary increases or in regard to travel reimbursements for which expenses could not be verified. The committee also found against Rasty on the issues of harassment, damages to his reputation, and whether there was an unhealthy atmosphere in the department. Rasty believes, however, that he "won" the grievance hearing. Burton later that same year also gave Rasty a poor performance evaluation and in the evaluation accused Rasty of unethical practices in relation to his submission of travel reimbursements. Rasty complains that the performance evaluation was never changed to remove the reimbursement issue from his personnel file. However, the record reveals that Rasty did not actually "win" on all of the issues before the committee relating to the travel incident.

In an apparent disparate treatment context, Rasty alleges that another Anglo-American professor received lenient treatment in relation to his travel reimbursement discrepancies relating to a conference in 1997, contending that the professor did not attend two days of a conference for which he claimed reimbursement, and that Burton allowed that professor to revise his forms without referencing the incident in his annual performance review. No evidence was presented, however, to show how that professor was in a position nearly identical to that of Rasty.

Actually, Rasty admitted in his deposition that he is unaware of whether the Anglo-American professor had a similar airline ticket that he was trying to get reimbursed for. Rasty is also unaware of the exact circumstances surrounding the Anglo-American professor's incident. Rather, Rasty simply makes a conclusory statement suggesting both circumstances were nearly identical.

In another incident in April of 1999, Burton contacted the then Dean of Engineering, Defendant Marcy, and notified him that Plaintiff Rasty had repeatedly made false statements regarding scholarly publications over the years. Defendant Marcy requested Rasty to resolve the issue by providing documentation before a formal investigation. Rasty e-mailed Defendant Marcy stating several reason why he believed the publications might have been incorrectly listed in university documents but did not admit to any wrongdoing. Defendant Marcy later recommended to Texas Tech's Vice-President of Research and to Defendant Burton that a formal investigation be conducted to resolve the matter. Rasty believes that it was improper for Defendant Marcy to determine that Rasty was possibly guilty and to recommend further investigations. A committee of non-departmental faculty was impaneled. Neither of the Individual Defendants was on the committee. It is also alleged that Defendant Burton "conspired" with the chair of the investigative committee by having private, informal meetings with the committee chair allegedly to "avoid written documentation that would be required to be released to Rasty." The investigative committee conducted several hearings. Rasty and Defendant Burton both testified at the hearings. Rasty was allowed to put on evidence at the hearings but complains that time restrictions and page limits were imposed upon

him. Rasty does not recall the exact page limit and time limit imposed upon him but states in his deposition that he believes the page limit could have been "something like [a] 25-page limit." The committee issued findings in March of 2000, determining that Rasty had engaged in deliberate falsification in the reporting of research publications and submissions over a prolonged period. The committee recommended that termination proceedings be initiated. Plaintiff Rasty first appealed the decision to the Provost, who denied his appeal and instead recommended the initiation of termination proceedings. Rasty believes that the Provost was biased.[1] Rasty further appealed the committee's findings to the University Tenure Advisory Committee ("UTAC") as allowed by University policies to tenured professors. The UTAC conducted additional hearings and allowed Rasty to provide all the documents and testimony he wished to produce at the hearings. In August of 2001, the UTAC issued its findings and determined that Rasty had not engaged in academic misconduct under the cited University policy he had been charged under. However, the UTAC did state that "faculty should meet higher standards of accuracy than Dr. Rasty has demonstrated, but we do not believe his failure in this regard is adequate cause for termination."

The UTAC recommended against filing formal charges to terminate Rasty and determined that he had been denied due process at certain stages of the investigation. It is not clear if the UTAC determined Rasty had been

[1] Rasty believed the Provost to be biased because Defendant Marcy had written the Provost regarding an earlier allegation in 1999 (see below) addressing concerns related to one of Rasty's research projects involving explosives; the Provost declined to act against Rasty.

denied process under Texas Tech's policies. Formal charges to terminate Rasty have never been filed during his tenure at Texas Tech, nor has he ever been suspended. On January of 2002, University President David Schmidley, who had the final say in the matter, informed Rasty by letter that he had decided not to initiate formal termination proceedings. However, Rasty believes that the University President did not completely exonerate Rasty of misconduct. The letter was placed in Rasty's personnel file. The University President also requested a meeting with Rasty. Rasty alleges that his request to have counsel present at the meeting was denied. In May of 2002, Rasty went to meet with the University President and was accompanied by a Texas Faculty Associate Grievance Consultant, who was to wait outside in case Rasty needed legal advice. However, Rasty was informed the meeting had been canceled and has not been rescheduled. Rasty alleges that he remains on "probation" as a tenured professor, but he admits in his deposition that no one told him he was on any form of probation. Rather, Plaintiff Rasty subjectively believes that it is implied that he is on probation. Defendants deny that Rasty is on any form of probation.

In an apparent attempt to show disparate treatment, Rasty alleges that in 1996 another Anglo-American professor had similar inaccuracies in his tenure-review materials. According to Rasty's allegations, Defendant Burton discounted the information by that professor as honest mistakes, and allegedly no action was taken against the professor. However, when that professor was confronted with accusation of misconduct, he immediately admitted that there was a mistake and changed it. It is not clear if that professor came forward to Defendant Burton on his

own or whether he was confronted on the issue by Defendant Burton. The Anglo-American professor was denied tenure that year because of the mistakes. The record reveals Plaintiff Rasty did not immediately admit to a mistake after confrontation. Rather, he tried to explain away the situation and the mistakes regarding the publications. Plaintiff Rasty has failed to produce evidence that would show that the Anglo professor and Rasty were in nearly identical circumstances at the time of their respective incidents.

Additionally related to the incident, Rasty admits to bringing allegations of academic misconduct against other professors when a determination was being made regarding the tenure of that person. Rasty concluded that such issues were proper and needed to be addressed in the context of publication records of the person being evaluated for tenure. Rasty thus admits that such investigative allegations are both reasonable and legitimate in such contexts. In fact, the record shows that Plaintiff Rasty's co-plaintiff in this case, Plaintiff Cardenas-Garcia, submitted two of Rasty's papers to Defendant Burton for Burton's judgmental review of whether there was misconduct or not. Apparently, Plaintiff Cardenas-Garcia in that instance reasonably believed a legitimate issue might exist in regard to Rasty's possible misconduct.

In another incident occurring in December of 1999, Rasty alleges that Marcy accused him of being dangerous while conducting a research project. The project dealt with high-energy munitions utilizing explosive-driven components for the U.S. Army and Air Force. Plaintiff Rasty alleges that Defendant Marcy requested that the University Provost, University President, and Senior Associate Dean of Engineering stop Rasty from participating in the

project. Allegedly, the request was made while Rasty was already being investigated by a committee for allegations of "misconduct in research." However, no action was ever taken against Plaintiff Rasty in response to Defendant Marcy's recommendation for an investigation.

Plaintiff Rasty alleges that in February of 2002, Defendant Burton, along with another professor, attempted to add prejudicial material to Rasty's post tenure-review materials for evaluation in an effort to find Rasty ineligible to continue his tenure status. The faculty reviews professor to determine whether that professor should maintain tenure by achieving milestones. The reviewed faculty member is generally not in attendance at the meeting. The record shows that e-mails were exchanged between the tenured faculty members, including Defendant Burton, as to what should or should not be included in the tenure-review materials. Plaintiff Rasty was also a recipient of the e-mails. Defendant Burton and another faculty member wanted to include some of the misconduct issues within Plaintiff Rasty's tenure-review materials. The reason proffered for attaching such information was that Plaintiff Rasty had attached the findings of the UTAC to the materials. Defendant Burton and the other faculty member felt that in all fairness the entire record of the investigation should be attached, including the initial investigative committee's findings, etc. Rasty felt that only the UTAC findings were important. Even though the UTAC report contained the entire record, the copy Rasty attached basically contained only the final finding. Furthermore, Defendants allege that the final finding actually referenced materials from the investigation that Plaintiff Rasty had not attached. Rasty believed that all "the other stuff" could be interpreted unfavorably

against him. It was determined that nothing should be added to Rasty's tenure-review materials; thus, the full record of the research misconduct issues was not included in Rasty's review materials.

On March 20, 2002, Defendant Burton informed Rasty that Rasty could no longer serve as faculty advisor for a student chapter of a mechanical engineering society. Rasty had served as the advisor for thirteen years. Rasty was replaced by an Anglo-American professor. Rasty alleges that his ability to obtain good performance reviews and salary increases was affected by the loss of the advisory position. The advisory position itself does not provide a salary increase, but Rasty claims he used the position as one of the components for his "service." As stated above, "service" is one of the components used in the annual performance evaluations. By losing the position, Rasty believes it has affected his annual evaluations and thus the amount of his salary increases. Rasty also alleges that he lost valuable networking opportunities because of the loss of the position. Plaintiff Rasty admits in his deposition that the constitution of the engineering society leaves the decision up to the students to select the faculty advisor. Rasty claims he was "never told by the students" that they chose a new advisor. Rather, Rasty believes that "as far as [he] know[s]," Defendant Burton made the decision. However, he further states in his deposition that "I have no idea" that the students didn't make the decision. Rasty further claims that if the students had complained to Defendant Burton regarding Rasty as an advisor, Burton should have approached Rasty before the students removed him from the position. Rasty never filed a grievance for having been removed as advisor to the engineering

society; Rasty has presented no evidence that Burton was responsible in any way for the change; and Rasty has presented no evidence to show that he was in any way entitled to the position.

With the exception of the last two years, Rasty has received a merit increase every year he has been at Texas Tech. Defendants allege that no pay increases have been available for the department during the last two years due to state budget constraints. Rasty believes that the substantial amount of time he has spent in the last five years dealing with grievances and lawsuits has affected his merit increases because he could otherwise have been excelling in his work. Rasty alleges that the salary increases he received were below those of other professors of the same or lesser rank in the MED from 1997 to 2000. In 2001, Rasty alleges, he was the lowest paid associate professor in the department. Defendant Burton has stated that Plaintiff Rasty has not been paid the same increases as other professors because his performance reviews do not merit such raises. Evidence exists in the record that students submitted unfavorable reviews of Plaintiff Rasty's teaching methods and abilities. Rasty, in his deposition, seems to imply that the students' beliefs and reviews should not be accorded much weight. Rasty also alleges that he is being penalized by Defendant Burton because Burton refuses to remove items from his performance reviews, such as the travel reimbursement incident and accusations. Apparently, Plaintiff Rasty is still employed at Texas Tech University.

II.

PROCEDURAL BACKGROUND

On May 15, 2003, Plaintiffs sought leave of this Court to amend their complaint and add Defendants Burton and Marcy as named defendants. The Court granted the request and Plaintiffs' First Amended Complaint was filed June 6, 2003. Defendants' First Amended Answer and Affirmative Defenses was filed June 18, 2003. Defendant Texas Tech's Partial Motion to Dismiss was granted by order of this Court on August 6, 2003, dismissing Plaintiffs' claims for monetary damages against Defendant Texas Tech based on §§ 1981 and 1983 as being barred by the Eleventh Amendment. Defendants Burton and Marcy filed their Motion for Summary Judgment on October 17, 2003. Plaintiffs filed their Response on November 6, 2003. Defendants Burton and Marcy filed their Reply on November 21, 2003.

III.

STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its

determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255.

Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. F. 56(e); *State Farm Life Ins. Co. v. Gutterman,* 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile,* 10 F.3d 1093, 1097 (5th Cir. 1993). Affidavits, or portions thereof, that are not based on personal knowledge or that are based merely on information and belief cannot be considered in deciding a motion for summary judgment. *Richardson v. Oldham,* 12 F.3d 1373, 1378-79 (5th Cir. 1994). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson,* 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands v. Washington Capital Dus, Inc.,* 66 F.3d 89, 92 (5th Cir. 1995), *as modified,* 70 F.3d 26 (5th Cir. 1995).

Finally, in reviewing the summary judgment evidence, "Rule 56 does not impose upon this Court a duty to sift through the record in search of evidence to support a

party's opposition to summary judgment." *Ragas v. Tenn. Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998). Nor does a court have a duty to search the record for triable issues. *Id.* Rather, the Court need rely only on those portions of the submitted documents to which the nonmoving party directs the Court's attention. *Id.* The party opposing summary judgment is required to articulate the precise manner in which the evidence supports his or her claim. *Id.* Moreover, Local Rule 56.5(c) expressly requires that a party filing an appendix "must include in its brief citations to each page of the appendix that supports each assertion that the party makes concerning the summary judgment evidence." A party may not rely upon "unsubstantiated assertions" as competent summary judgment evidence. *Id.* at 458.

In cases where the defense of qualified immunity is raised, the defendant is not required to put forth evidence to meet its summary judgment burden for a claim of immunity. *Beck v. Tex. State Bd. of Dental Exam'rs,* 204 F.3d 629, 633 (5th Cir. 2000). "It is sufficient that the movant in good faith pleads that it is entitled to absolute or qualified immunity." *Id.* The burden is on the plaintiff to overcome a defendant's defense of qualified immunity. *Burns-Toole v. Byrne,* 11 F.3d 1270, 1274 (5th Cir. I994). The plaintiff must plead facts with sufficient particularity so that the facts, if proved, would warrant the relief sought. *Id.* Heightened pleadings in qualified immunity cases requires that the plaintiffs rest their complaint on more than mere conclusions alone and plead their case with precision and factual specificity. *Reyes v. Sazan,* 168 F.3d 158, 161 (5th Cir. 1999). A plaintiff's complaint must allege "with particularity all material facts on which [the claimant] contends he will establish his right to recovery,

which will include detailed facts supporting the contention that the plea of immunity cannot be sustained." *Morrison v. City of Baton Rouge,* 761 F.2d at 244, 245 (5th Cir. 1985).

IV.

DISCUSSION

Qualified Immunity

Officials sued in their individual capacity may assert a defense of qualified immunity. *See Petta v. Rivera,* 143 F.3d 895, 898 (5th Cir. 1998). The doctrine of qualified immunity serves to shield a government official as "an immunity from suit rather than a mere defense to liability[.]" *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 2156 (2001) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985)). Because qualified immunity is an immunity from suit, the affirmative defense should be resolved at the earliest possible stage of litigation, *Saucier,* 121 S. Ct. at 2156, and should protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 344-345 (1986).

In analyzing whether an individual defendant is entitled to qualified immunity, the Court must ask a threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant]'s conduct violated a constitutional [or statutory] right?" *Saucier,* 121 S. Ct. at 2156. The Fifth Circuit does "not require that an official demonstrate that he did not violate clearly established federal rights; [precedence] places that burden upon plaintiffs." *Thompson v. Upshur,* 245 F.3d 447, 456 (5th Cir. 2001). "[I]f a violation could be made out on a favorable view of the

parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* (alterations added). In other words, the Court should examine whether it would be clear to a reasonable defendant that his conduct is unlawful in the situation he confronted. *Wilson v. Layne,* 526 U.S. 603, 615 (1999).

To the extent that the plaintiff is able to show that a violation of a clearly established right occurred, the Court must then make an additional inquiry and determine whether the defendant official's alleged conduct was objectively reasonable in light of the right allegedly violated. *See Glenn v. City of Tyler,* 242 F.3d 307, 312 (5th Cir. 2001). However, if the plaintiff is unable to show a violation or that such a right was clearly established at the time, the inquiry ceases and there is no need to address the next step of the analysis of objective reasonableness. *Nunez v. Simms,* 341 F.3d 385, 392 (5th Cir. 2003). "The defendant's acts are held to be objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known" that the defendant's conduct violated the plaintiff's asserted constitutional rights or a federal statute. *Thompson,* 245 F.3d at 457 (emphasis in original). The "defendant's circumstances" include facts known to the defendant at the time, *id.,* and the particulars of the challenged conduct. *Pierce v. Smith,* 117 F.3d 866, 872 (5th Cir. 1997). However, a particular defendant's subjective state of mind has no bearing on whether he is entitled to qualified immunity. *Id.* at 871 n.5. If defendants "of reasonable competence could disagree on th[e] issue, immunity should be recognized." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). This second step of objective reasonableness applies the law that was clearly established at the time of the alleged violation.

Thompson, 245 F.3d at 457. Determination of objective reasonableness is a question of law for the courts to decide. *See Kipps v. Caillier,* 197 F.3d 765, 768 (5th Cir. 1999).

Title VII

The Fifth Circuit has refused to impose liability on individual public employees for Title VII violations. *See Grant v. Lone Star Co.,* 21 F.3d 649, 651-52 (5th Cir. 1994); *Felton v. Polles,* 315 F.3d 470, 478 (5th Cir. 2002). "Only 'employers,' not individuals acting in their individual capacity who do not otherwise meet the definition of 'employers,' can be liable under title VII." *Grant,* 21 F.3d at 652. Supervisory personnel are not considered "employers." *See id.* Because the parties at times seem to blur the alleged claims in their filings, the Court feels compelled to state: Defendants Burton and Marcy are not employers, but merely supervisors at the most; thus, Title VII does not as a matter of law impose liability upon them in their individual capacities. Plaintiffs must pursue claims against the Individual Defendants under §§ 1981 and 1983.

42 U.S.C.A.1981

Section 1981, which was enacted to strengthen the scope of federal civil rights protection and to deter and protect against unlawful discrimination in employment settings, provides as follows:

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in

> every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> * * *
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (1994). Unlike § 1983, § 1981 is itself a source of substantive rights. *See Felton,* 315 F.3d at 479. "Plaintiffs must assert a cause of action against individual fellow employees under § 1983 to remedy violations of civil rights under § 1981." *Id.* at 482. Section 1981 liability will lie against an individual defendant if the individual defendant is essentially the same as the State for the purposes of the complained of conduct. *Foley v. Univ. of Houston Sys.*, ___ F.3d ___, slip op. at *3 (5th Cir. Dec. 18, 2003).

The elements of claims alleging violations of § 1981 and Title VII are identical. *Flanagan v. Aaron E. Henry Cmty. Health Servs. Ctr.*, 876 F.2d 1231, 1233 (5th Cir. 1989). Thus, employment discrimination claims brought under § 1981 are analyzed under the same evidentiary

framework as Title VII claims.[2] *Walker v. Thompson,* 214 F.3d 615, 625 (5th Cir. 2000).

42 U.S.C. § 1983

Plaintiff also sued Individual Defendants under § 1983 seeking redress for Defendants' alleged national origin discrimination, harassment, retaliation, and due process violations. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). Section 1983 is not itself a source of substantive rights but merely provides "a method of vindicating federal rights conferred elsewhere." *Albright v. Oliver,* 510 U.S. 266, 271 (1984) (internal quotations omitted).

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[2] The Fifth Circuit has been somewhat unclear on whether a plaintiff may bring § 1981 claims based on national origin. This circuit has clearly held that § 1981 claims based on race or alienage are proper. *Chaiffetez v. Robertson Research Holding Ltd.,* 798 F.2d 731 (5th Cir. 1986). Courts in this circuit also seem to have determined that when a plaintiff's complaint can be interpreted as not only alleging national origin claims but also as including allegations that implicate the plaintiff's race or distinct ethnic class, then § 1981 is a proper avenue for the allegations. *See Jatoi v. Hurst-Euless-Bedford Hosp. Auth.,* 807 F.2d 1214 (5th Cir. 1987).

To establish a claim under § 1983, a plaintiff must prove that a person acting under the color of state law deprived the plaintiff of a right secured by the Constitution or the laws of the United States. *Martin v. Thomas,* 973 F.2d 449, 452-53 (5th Cir. 1992); *Augustine v. Doe,* 740 F.2d 322, 324-25 (5th Cir. 1984). A plaintiff must further prove that the alleged deprivation was not the result of mere negligence. *Farmer v. Brennan,* 511 U.S. 825, 835 (1994).

In assessing an individual supervisor's liability under § 1983, this circuit applies a standard which finds a supervisor liable "only if (1) his conduct directly causes a constitutional violation or (2) the plaintiff can show the supervisor was deliberately indifferent to a violation of a constitutional right." *Breaux v. City of Garland,* 205 F.3d 150, 161 (5th Cir. 2000).

Prima Facie Case and Burden Shifting

A plaintiff may establish a violation by using either direct evidence of discrimination, statistical proof, or circumstantial evidence. *Urbano, v. Continental Airlines, Inc.,* 138 F.3d 204, 206 (5th Cir. 1998). Absent direct evidence of discrimination based on race, gender, or age, a plaintiff may establish unlawful discrimination under the basic framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The Court finds that Plaintiffs have not produced evidence that could reasonably be construed as direct evidence of discrimination. Thus, the burden-shifting framework of *McDonnell Douglas* will be used to evaluate whether Plaintiffs have met their burden.

A plaintiff satisfies the first phase by meeting the elements required to establish a prima facie case for the cause of action pleaded. *See Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1178 (5th Cir. 1990) (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). A defendant must satisfy the second phase by offering a legitimate, nondiscriminatory reason for any ultimate adverse employment action taken against a plaintiff. Defendant's "burden is one of production, not persuasion; it 'can involve no credibility assessment.'" *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000).

Once the defendant satisfies this burden of production, the question is "whether there exist material facts upon which a jury could conclude that Defendant's stated reason . . . is pretextual." *Montgomery v. Brookshire*, 880 F. Supp. 483, 486 (W.D. Tex. 1995). The plaintiff has the burden and must adduce specific evidence that would permit a reasonable trier of fact to find that the proffered reason for the adverse employment action is a pretext. *See id.; see also Smith*, 891 F.2d at 1178; *EEOC v. J. M. Huber Corp.*, 927 F.2d 1322, 1326 (5th Cir. 1991).

Prima Facie Case

(A) National Origin Discrimination/Disparate Treatment[3]

To establish a prima facie case of national origin discrimination, a plaintiff must establish that he was (1) a member of a protected group; (2) qualified for the position

[3] Plaintiffs allege discrimination based on national origin. The Court will analyze this cause of action as a disparate treatment claim based on national origin.

held; (3) suffered an adverse employment action; and (4) treated less favorably than employees not in the protected class or replaced by someone not in the protected class. *Rios v. Rossotti,* 252 F.3d 375, 378 (5th Cir. 2001); *see LaPierre v. Benson Nissan, Inc.,* 86 F.3d 444, 448 n. 3 (5th Cir. 1996) (explaining that "[t]he elements of a plaintiff's prima facie case necessarily vary according to the facts of the case and the nature of the claim"); *see also Byers,* 209 F.3d at 426; *Bauer v. Albemarle Corp.,* 169 F.3d 962, 966 (5th Cir. 1999).

In establishing the third element, the Fifth Circuit has analyzed an "adverse employment action" more strictly than other circuits and requires that only an "ultimate employment decision" can form the basis for liability. *Burger v. Central Apartment Mgmt, Inc.,* 168 F.3d 875, 878 (5th Cir. 1999) (citing *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 707 (5th Cir. 1997)).

Ultimate Adverse Employment Decisions[4]

"'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Id.* Importantly, an employer's action does not rise to the level of an "adverse employment action" when it fails to have more than a tangential effect on a possible future ultimate employment decision. *Id.* An employee in jeopardy of being discharged at some point in the future "obviously does not equal being discharged," and such action thus is not an ultimate employment decision. *Mattern,* 104 F.3d at 708. Some employment actions have

[4] The ultimate adverse employment action is also relevant to the retaliation cause of action discussed below.

been found not to constitute "adverse employment actions" for purposes of establishing a prima facie case because such decisions are not "ultimate employment decisions." *Ackel v. Nat'l Communications, Inc.*, 339 F.3d 376, 385 (5th Cir. 2003). Activities which are not ultimate employment decisions include: ostracism by coworkers, loss of some job duties, formal discipline, rude treatment by employer, verbal reprimands, threats of potential dismissal, criticism of work or conduct, refusal to consider employee's input in business decision, and low evaluations that could lead to missed pay increases. *See Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528, 532 n. 2 (5th Cir. 2003); *see Kang v. Bd. of Supervisors of Louisiana State Univ.*, 75 Fed. Appx. 974, 2003 WL 22272920 (5th Cir. Oct. 3, 2003) (not designated for publication in the Federal Reporter)[5]. Hostility from fellow employees and resulting anxiety do not constitute adverse employment actions. *Landgraf v. USI Film Prods.*, 968 F.2d 427, 431 (5th Cir. 1992). Specifically relating to the education context, the Fifth Circuit has held that "decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures, while extremely important to the person . . . , do not rise to the level of a constitutional deprivation." *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). Nothing more than a dispute over the quantum of pay increases is not an actionable adverse employment activity,

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[5] In *Kang*, the Fifth Circuit determined that the complained-of conduct did not constitute an adverse employment action. The plaintiff alleged that (1) he had received a poor performance evaluation from the department head; (2) he had been "written up"; (3) he had received a less-than-average pay raise, making him the lowest-paid professor in the department; (4) he was not nominated for an award even though he had been nominated in previous years; and (5) he was "unfairly and unjustly" criticized at a faculty meeting. *Kang*, 2003 WL 22272920 at *2.

especially when nothing in the record upon which a determination could be made shows that the defendant was obligated to give the same dollar amount or same percentage increase to each professor. *Id.* at 366.

(b) Retaliation

To establish retaliation, a plaintiff must show (1) that he engaged in a protected activity; (2) that an adverse employment action occurred; and (3) that a causal link existed between the protected activity and the adverse action. *Golf v. Cont'l Oil Co.,* 678 F.2d 593, 597-99 (5th Cir. 1982). The burden-shifting framework of *McDonnell Douglas* also applies to retaliation cases. *Montemayor v. City of San Antonio,* 276 F.3d 687, 692 (5th Car. 2001).

To establish the first element, a plaintiff must show that his activity was protected. The filing of an internal discrimination complaint is a protected activity. *Fierros v. Texas Dep't of Health,* 274 F.3d 187, 194 (5th Cir. 2001). In establishing the second element, the court is only to be concerned with ultimate employment decisions. *Walker v. Thompson,* 214 F.3d 615, 629 (5th Cir. 2000). To establish the second element of an adverse employment action, a plaintiff must show that he suffered an adverse action.

To establish the third element of causation, a plaintiff must show some evidence of a causal link between engaging in a protected activity and the subject action of which he claims. *Ackel,* 339 F.3d at 385. The question is not whether an employer made an erroneous decision; it is whether the decision was made with discriminatory motive. *Id.* at 1091.

In retaliation cases, the defendant may offer a legitimate reason why the adverse employment action occurred. The Fifth Circuit has "consistently held that in retaliation cases where the defendant has proffered a nondiscriminatory purpose for the adverse employment action the plaintiff has the burden of proving "but for" the discriminatory purpose he would not have [had the action taken against him]." *Pineda v. United Parcel Serv.,* No. 03-50268 (5th Cir. Dec. 30, 2003); *Long v. Eastfield College,* 88 F.3d 300, 305 n. 4 (5th Cir. 1996) (no liability exists for unlawful retaliation if the action would have occurred anyway even in the absence of the protected conduct).

(c) Harassment/Hostile Work Environment

A prima facie case of hostile work environment consist of (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on being a member of the protected group; and (4) the harassment complained of affected a term, condition, or privilege of employment. *Felton,* 315 F.3d at 484 (where the harassment is allegedly committed by a supervisor with immediate (or successively higher) authority over the harassment victim, the employee need only satisfy the first four of the usual five elements of harassment).

For harassment to affect a term, condition, or privilege of employment, it must be sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create what a reasonable person would find to be an abusive working environment. *Felton,* 315 F.3d at 485; *Mota v. Univ. of Tex. Houston Health Sci. Ctr.,* 261 F.3d 512, 523 (5th Cir.2001). Whether an environment

is hostile or abusive depends on the totality of circumstances, focusing on factors such as "the frequency of the conduct, the severity of the conduct, the degree to which the conduct is physically threatening or humiliating, and the degree to which the conduct unreasonably interferes with an employee's work performance." *Id.* at 523-24. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in 'the terms and conditions of employment.'" *Faragher v. City of Boca Raton,* 524 U.S. 775, 778 (1998). The "mere utterance of an . . . epithet which engenders offensive feelings in an employee" is insufficient, without more, to support liability. *Meritor Savs. Bank v. Vinson,* 477 U.S. 57, 67 (1986).

Limitations – continuing violation

Defendants raise the defense of limitations in their motion and brief Defendants state that most, if not all, of the alleged incidents occurred more than two years prior to the Individual Defendants being added to the suit. The Court has determined the applicable limitations period for Plaintiffs §§ 1981 and 1983 claims is two years. This circuit has consistently applied the Texas limitations period for personal injury torts to § 1981 cases. *See Price v. Digital Equip. Corp.,* 846 F.2d 1026, 1028 (5th Cir. 1988); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). The Fifth Circuit also applies the two-year limitations period to § 1983 suits tried in Texas. *Id.*

Thus, under the two-year limitations period, the Court must determine if the alleged acts for which the Plaintiffs advance their claims occurred within two years prior to the Individual Defendants being sued. The Individual

Defendants were added to this suit on May 15, 2003. Any adverse employment actions under § 1981 that occurred before May 15, 2001, would generally be time-barred.

The Plaintiffs assert that the alleged incidents were part of a pattern and therefore a "continuing violation" and not barred by limitations. In sum, the Plaintiffs allege that a continuing violation applies because the various adverse employment actions constituted an organized scheme to discriminate rather than discrete occurrences and their claims show a pattern or practice of discrimination. The continuing-violation theory has been paraphrased by the Fifth Circuit as follows:

> The continuing violation theory relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period. The continuing violation doctrine is designed to "accommodate plaintiffs who can show that there has been a pattern or policy of discrimination continuing from outside the limitations period into the statutory limitations period, so that all discriminatory acts committed as part of this pattern or policy can be considered timely."

Celestine v. Petroleos De Venezuella SA, 266 F.3d 343, 351-52 (5th Cir. 2001) (internal citations omitted). However, discrete employment events should put the employee on notice that a cause of action has accrued. *Huckabay v. Moore,* 142 F.3d 233, 240 (5th Cir. 1998). Such discrete actions, though racially motivated, "cannot be lumped together with the day-to-day pattern of [] harassment"

and therefore, if otherwise untimely, cannot be saved by the continuing-violation doctrine. *Celestine,* 266 F.3d at 352 (quoting *Huckabay,* 142 F.3d at 240).

Hostile work environment claims are potentially more compatible with the continuing-violation doctrine than are discrete employment events. *Id.* The continuing-violation doctrine does not automatically attach in a hostile work environment case; the burden remains on the employee to demonstrate an *organized scheme* led to and included the present violation. *Id.* (emphasis added). The plaintiff must also point to at least one violation within the limitations period in order to render the complaint timely as to a course of conduct. *Huckabay,* 142 F.3d at 240.

Additionally, where a pattern of harassment is spread out over years, and it is evident long before the plaintiff sues that the plaintiff was a victim of actionable harassment, then the plaintiff cannot reach back and base the suit on conduct that occurred outside of the limitations period. *Celestine,* 266 F.3d at 352 (quoting *Hardin v. S.C. Johnson & Son, Inc.,* 167 F.3d 340, 344 (7th Cir. 1999)). Finally, plaintiffs are not allowed to "paint with wide brush strokes, making broad generalizations about the working conditions" over the last several years. *Id.* at 353. A district court will not err in refusing to consider alleged acts of harassment outside of the limitations period if the plaintiff fails to carry the burden in invoking the continuing-violation doctrine. *Id.*

PLAINTIFF CARDENAS-GARCIA

Plaintiff Cardenas-Garcia complains of separate and varied acts and decisions that occurred at different times and discretely applied in different ways to him than to

Plaintiff Rasty. As to Plaintiff Cardenas-Garcia's allegations regarding discrete actions or conduct, those claims are time-barred if they do not fall within the limitations period. In relation to his harassment claims, Plaintiff Cardenas-Garcia had at prior times complained internally regarding allegedly harassing comments and conduct based on national origin. Thus, it is apparent that he believed the comments and conduct were discriminatory harassment long before he filed this suit. It logically "follows that it would not have been unreasonable" for him to seek redress before the limitations period ran out. *See Hardin,* 167 F.3d at 344. Therefore, Plaintiff Cardenas-Garcia may not reach back and rely on evidence occurring prior to the limitations period to make a charge concerning an act that was not independently discriminatory. *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002).

Furthermore, the Court finds that Plaintiff Cardenas-Garcia has failed to allege at least one violation within the limitations period as is required to invoke the continuing-violation doctrine. Liberally construed, the only alleged incidents that may have occurred within the limitations period are (1) the allegation regarding due process violation related to the grievance Cardenas-Garcia filed against Defendant Burton, (2) the allegation of constructive discharge which would have occurred in 2002 when Cardenas-Garcia resigned and left for the new position in Maryland, and (3) allegations of discriminatory pay increases.

As to the first incident, Plaintiff Cardenas-Garcia alleges that the request to drop the discrimination charge was a violation of his rights. He appears to further allege that the delay and failure to resolve the issue forms the basis for an "ongoing act of discriminatory and retaliatory

conduct, as well as deprivation of due process" within the limitations period. *See* Pl. Br. at 20. However, the law states otherwise. After-the-fact remarks following the filing of a grievance or claim do not evince discriminatory motive or action. *See Williams v. Cigna Financial Advisors Inc.*, 197 F.3d 752, 763 n.4 (5th Cir. 1999) (stating ADEA anti-retaliation provisions are not violated by employer's reasonable defensive measures, requests to drop charges, or settlement proposals). Rather, such comments "may be read as an expression of the candid opinion" of Defendant Burton that Plaintiff Cardenas-Garcia was "pursu[ing] a groundless discrimination claim." *See id.* Plaintiff Cardenas-Garcia also claims that Defendant Burton was not originally open to mediating the claim. An employer is not legally required to attempt to settle an employee's claim, and any action or inaction in regard to settlement of a claim cannot be retaliation for making the claim. *See* 45A Am. Jur. 2d *Job Discrimination* § 220 (2003). Moreover, under the circumstances that existed at the time (Cardenas-Garcia's being out of the state and accepting a job in Maryland), Defendants' actions in not pursuing the grievance claim cannot be said to have been discriminatory. Other than Defendant Burton's request to drop the discrimination portion of the grievance and Defendant Marcy's offer to pay for the mediation out of departmental funds, Plaintiff Cardenas-Garcia has not shown how the Individual Defendants are involved in the grievance committee's failure to pursue the matter. The conduct complained of actually involving the Individual Defendants does not amount to a deprivation of due process or discrimination.

As to the second allegation by Cardenas-Garcia that might fall within the limitations period, that he was

constructively discharged, the Court finds that he has failed to produce evidence which would create a genuine issue of material fact for which a jury could find in his favor. Cardenas-Garcia did not plead constructive discharge specifically under §§ 1981 or 1983 but instead pleaded constructive discharge under a Title VII cause of action. As stated above, no claims under Title VII can be brought against the Individual Defendants. However, regardless of how the claim is brought, Cardenas-Garcia has not established constructive discharge. In order to establish constructive discharge, a plaintiff must establish that "working conditions were so intolerable that a reasonable employee would feel compelled to resign." *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001). "Constructive discharge requires a greater degree of harassment than that required by a hostile environment claim." *Id.* "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge." *Id.* Here, Plaintiff Cardenas-Garcia has offered no evidence of intolerable working conditions or any degree of harassment sufficient to support his claim of constructive discharge or even the less-stringent claim of hostile environment. There is no evidence to support a finding that a reasonable person in Cardenas-Garcia's position would have felt compelled to resign. After all, Plaintiff Rasty, who alleges the same types of harassment and discrimination (and arguably alleges more incidents of harassment and discrimination), is still working for Texas Tech University. Cardenas-Garcia has offered no evidence of conduct by the Defendants which was so severe and pervasive as to alter the conditions of his employment or interfere with his work performance such as would reasonably cause him to resign. Accordingly, this Court finds

that Plaintiff Cardenas-Garcia has failed to establish his prima facie burden for a claim of constructive discharge.

Plaintiff Cardenas-Garcia also alleges that his pay increases were discriminatory based upon his national origin. However, any allegedly discriminatory pay increases occurring before May 15, 2001, were discrete acts which are barred by limitations. The record reveals that because of state budget constraints, no merit increases were given in the last few years. Thus, it appears that Plaintiff Cardenas-Garcia has no actionable claim as to salary pay increases. Moreover, the Court finds that Defendants' reasons proffered for the amounts of Cardenas-Garcia's pay increases were legitimate, nondiscriminatory, and without pretext.

The Court further finds that because Plaintiff Cardenas-Garcia has not alleged at least one act within the limitations period that would allow his §§ 1981 and 1983 claims to proceed against the Individual Defendants, Plaintiff has failed to meet his burden of proving a continuing violation. Moreover, the Court finds that there is no support in the record for Plaintiff Cardenas-Garcia's speculation of an organized scheme of national origin discrimination, retaliation, or harassment against him. Thus, Plaintiff has failed to show a continuing violation. Therefore, all claims for actions outside the two-year limitations period for §§ 1981 and 1983 are barred by limitations.

However, even if limitations were not an issue, Cardenas-Garcia's claims would still fail. After a careful review of the record as to the Individual Defendants'

conduct,[6] the Court finds that Cardenas-Garcia has not made a prima facie case of national origin discrimination, harassment, or retaliation. As a threshold matter, Cardenas-Garcia must prove that he was "treated less favorably than employees not" within his national origin class, that he suffered "an adverse employment action" in the form of retaliation, or that the Individual Defendants' conduct "affected a term, condition, or privilege of employment," and that the Individual Defendants' proffered reasons for their alleged conduct were not legitimate, nondiscriminatory reasons.

Although found to be time-barred, for the sake of thoroughness, the Court will briefly examine specific alleged incidents that Plaintiff Cardenas-Garcia claims show disparate treatment, retaliation, and harassment.

There is insufficient evidence in the record to reasonably show that Cardenas-Garcia was subjected to disparate treatment based on national origin. Cardenas-Garcia has not shown that he was treated differently than similarly situated employees not within his class. Cardenas-Garcia specifically alleges that Defendant Burton discriminated against him in Burton's evaluations of Cardenas-Garcia and that Burton gave another Anglo faculty member who had also received poor student evaluations a better annual evaluation. Besides mere conclusions and speculations, Plaintiff Cardenas-Garcia has not presented evidence that the other Anglo faculty

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[6] In his filings with this Court, Cardenas-Garcia makes many allegations of statements made or conduct that occurred over the years. However, often the complained-of incidents involve third parties rather than actions or comments made or approved of by the Individual Defendants.

member's more favorable evaluations were improper, considering the contributions made by the Anglo faculty member which were cited by Defendant Burton in the evaluation. To show disparate treatment, a plaintiff must prove that the employer gave preferential treatment to another employee under "nearly identical" circumstances. *Okoye v. Univ. of Texas Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001). It cannot be said that both Plaintiff Cardenas-Garcia and the Anglo faculty member are in nearly identical positions because of the stated reasons for the favorable evaluation, which did not likewise exist for Cardenas-Garcia. "Merely disagreeing with an employer's negative performance assessment is insufficient to show pretext." *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002) (citing *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 408 (5th Cir. 1999)). Moreover, and highly pertinent to this case, "[p]oor work performance is a legitimate, non-discriminatory reason" for Plaintiff Cardenas-Garcia's negative performance assessments and the lower pay raise amounts he received. *Id.* Additionally, none of these actions complained of by Cardenas-Garcia by themselves rise to the level of an ultimate employment decision. Although Cardenas-Garcia alleges that his decision to resign his TTU employment was influenced by these events, the facts show that Cardenas-Garcia failed to pursue his grievance while on sabbatical to the University of Maryland, and the ultimate decision to accept employment at the University of Maryland was his own.

As discussed above, the facts do not support a showing of constructive discharge. Nor do the facts support a prima facie case for disparate treatment. With regard to Plaintiff's claim of disparate treatment, it is apparent from the

record that Plaintiff Cardenas-Garcia has not shown that he was "treated less favorably than employees not in the protected class" under nearly identical circumstances. Nor has he shown that the actions of which he complains resulted in an adverse employment action. Finally, he has not shown that the reasons offered by Defendants for his evaluation could reasonably be regarded as merely pretext.

Concerning his retaliation claim, Cardenas-Garcia has not shown an adverse employment action, a requisite for proving retaliation. As discussed above, he has not shown constructive discharge. Cardenas-Garcia appears to claim that he was given less-than-average pay raises, causing him to be the lowest-paid full professor in his department. In *Fierros v. Texas Department of Health,* the Fifth Circuit explained that a denial of a pay increase can be an "ultimate employment action." *Fierros,* 274 F.3d at 193. However, it is undisputed that Cardenas-Garcia did receive pay raises when raises were given out by the department. Although the Fifth Circuit has never explained precisely when denials of pay raises constitute ultimate employment decisions, under the circumstances of this case and as discussed above, it cannot be said that Plaintiff Cardenas-Garcia has suffered an adverse employment action. Cardenas-Garcia has not shown any other possible adverse employment actions. Therefore, it is clear to this Court that the Individual Defendants did not take "an adverse employment action" against Cardenas-Garcia. Moreover, Cardenas-Garcia has not produced any evidence to show that the Individual Defendants' reasons were pretextual for any supposedly adverse employment actions.

As to Cardenas-Garcia's harassment claim, there is no evidence in the record that the Individual Defendants engaged in harassing conduct against him, rather, only conclusory allegations exist. Moreover, most of the allegations relied upon, besides being time-barred, did not have anything to do with any actions or conduct by the Individual Defendants. As to the remarks made by Burton regarding the graduate program, stray remarks alone will not overcome overwhelming evidence corroborating the defendant's non-discriminatory rationale. *See, e.g., Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996). Nor can it even be said that such remarks contain any discriminatory intent, and this Court finds that the remarks did not. For a harassment claim, Cardenas-Garcia must show that the discriminatory conduct was severe or pervasive enough to create an objectively hostile or abusive work environment. Cardenas-Garcia testified that, although he had on a few occasions overheard comments used by his coworkers that he felt were discriminatory, there is no evidence in the record that the comments were ever directed at him personally. He does allege that a coworker caused him to feel physically threatened by standing in Cardenas-Garcia's office doorway with a legal pad in hand demanding explanations, but such conduct could not reasonably be said to be physically threatening; and in any event the Court finds that the alleged incident was not perpetrated or approved of by the Defendants. Under the circumstances in this case, this Court finds that a jury could not rationally infer that the conduct of the Individual Defendants was sufficiently severe or pervasive so as to alter the conditions of employment and create a harassing or hostile work environment for Plaintiff Cardenas-Garcia. The Court further finds that Plaintiff Cardenas-Garcia has not presented evidence that could reasonably be construed as

overcoming Defendants' legitimate, non-discriminatory reasons for their conduct.

Thus, Plaintiff Cardenas-Garcia has not shown that the Individual Defendants violated clearly established statutory or constitutional rights. Moreover, almost all of the complained-of comments and conduct occurred more than two years before the Individual Defendants were sued. Even if Cardenas-Garcia had shown the violation of a clearly established right, he has failed to establish that the reasons proffered for the alleged conduct of the Defendants were pretextual. Additionally, the Court finds that Plaintiff Cardenas-Garcia has not shown that the Defendants violated his due process rights relating to the grievances he filed.[7] Academic decisions are accorded substantial deference under judicial evaluation and a plaintiff must establish that the person or committee responsible did not exercise reasonable professional judgment. *See Regents of the Univ. of Michigan v. Ewing,* 474 U.S. 214, 225 (1985). The Court finds that Plaintiff Cardenas-Garcia has not, under the circumstances of this case, shown that the Defendants' failure to pursue his grievances in his absence and following his departure were a substantial departure from the reasonably accepted norm. *See id.* Regarding the due process cause of action under § 1983 advanced by Plaintiff Cardenas-Garcia, the

[7] Careful inspection of the Due Process Cause of Action reveals that the only specifically pleaded claim relating to Cardenas-Garcia deals with procedural due process rights and the grievance he filed. However, if Plaintiff Cardenas-Garcia believes he has advanced substantive due process claims relating to salary increases, they also fail for the same reasons discussed below regarding Plaintiff Rasty's substantive due process claims as to salary increases.

Court finds that summary judgment is proper as no genuine issue of fact exists.

Cardenas-Garcia has also failed to establish that the alleged conduct of the Individual Defendants was objectively unreasonable in light of the circumstances. The qualified immunity decision must be based upon admissible evidence. *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 191 (5th Cir. 1991). A plaintiff cannot meet his burden and establish that a state official is not entitled to qualified immunity through the submission of conclusory allegations and conjecture. *Salas v. Carpenter,* 980 F.2d 299, 305 (5th Cir. 1992). Beyond that, there is no evidence in the record to even suggest that the actions of the Individual Defendants were objectively unreasonable under the circumstances as to any claim advanced by Plaintiff Cardenas-Garcia. The Defendants submit, and the Court agrees, that Cardenas-Garcia has not submitted relevant, admissible evidence to establish that he can meet the requirements for individual liability. Therefore, for the above-stated reasons and discussion, summary judgment is **GRANTED** for Defendants Burton and Marcy, individually, as to Plaintiff Cardenas-Garcia's claims against them.

PLAINTIFF RASTY

Plaintiff Rasty faces the same limitations problems encountered by Plaintiff Cardenas-Garcia. Rasty, like Cardenas-Garcia, also raises the continuing-violation doctrine in an effort to save alleged incidents of discrimination from being time-barred by limitations. As discussed above, discrete acts cannot be brought under the continuing-violation doctrine. Thus, any alleged discrete

discriminatory action by the Individual Defendants must have occurred within two years prior to the Individual Defendants' having been made parties to the suit. Plaintiff Rasty may only complain of alleged discrete incidents following May 15, 2001. Furthermore, in order to invoke the continuing-violation doctrine for a harassment claim, Rasty must demonstrate that an *organized scheme* led to and included a present violation within the limitations period. *See Celestine,* 266 F.3d at 352. The Court finds that, as with Plaintiff Cardenas-Garcia, Plaintiff Rasty has failed to show a continuing violation.

Plaintiff Rasty alleges four incidents which, when construed very liberally, may fall within the relevant limitations period. First, he alleges that the investigation relating to academic dishonesty lingered through and into the limitations period because the UTAC did not issue its findings until August of 2001 and the University President did not decide to forgo initiating formal termination proceedings until January 2002. Second, Rasty alleges that Defendant Burton attempted to add prejudicial material to Rasty's post tenure-review materials in an alleged effort to find Rasty ineligible to continue tenure. Third, Plaintiff Rasty alleges that Defendant Burton informed him that he could no longer serve as advisor/sponsor of a student organization. Fourth, Rasty complains that the amount of his salary increases were lower than they should have been because of discriminatory reasons. Plaintiff Rasty also complains of a complaint relating to his research on explosives; however, that incident occurred in 1999 and he has not directed the Court to any evidence in the record that the discrete act of that complaint resulted in an investigation that lingered

into the limitations period. Nor has he shown any action taken against him because of the complaint. Therefore, the Court views any allegedly discriminatory conduct from the complaint relating to research on explosives as time-barred.

As to the incident regarding the investigation of academic dishonesty by Rasty, it appears to the Court that Plaintiff Rasty wishes to pursue claims for both disparate treatment and retaliation based on national origin in relation to that incident. In regard to disparate treatment, it is not clear that Rasty has shown that he was treated differently than someone under nearly identical circumstances not of his national origin. Even if construed liberally, his claim that another Anglo professor was allowed to correct his mistakes does not show how that professor was in nearly identical circumstances. In fact, the record reveals that the Anglo professor admitted his mistakes and offered to correct them. Additionally, no ultimate adverse employment action was taken against Rasty. He was not terminated; rather, an investigation was conducted under which he was cleared of wrongdoing under the charged offense. An investigation of an employee's alleged misconduct is not an adverse employment action for purposes of disparate treatment. *See Felton,* 315 F.3d at 487 (citing *Mattern,* 104 F.3d at 708) (also stating that an adverse employment action does not include disciplinary filings). Even if a prima facie case could liberally be construed, Plaintiff Rasty has failed to overcome the Defendants' legitimate, nondiscriminatory reasons for the investigation.

Rasty also alleges that Defendant Burton retaliated against him by initiating the investigation in response to the grievance filed by Plaintiff Rasty against Defendant

Burton relating to the travel reimbursement issue and salary increases. Plaintiff Rasty implies that the timing of the investigation initiated by Defendant Burton leads to the conclusion that a retaliatory motive existed. However, evidence exists that shows the investigation was not formally commenced until many months later. Plaintiff Rasty also advances other reasons that he believes shows retaliatory motive. Rasty believes that he won in the grievance proceeding against Defendant Burton although, as discussed above, he actually lost on nearly all the issues. Additionally, Rasty believes that the investigation was based in part on something Rasty had said in the prior grievance proceeding against Burton. Defendant Burton's April 19 allegation does reference a statement made by Rasty in the prior grievance proceeding; however, Burton referred to the statement to show that Rasty had again misrepresented his research publications. The Court finds not retaliatory motive in such a reference to Rasty's prior statement. Thus, the Court finds that the conclusory reasons advanced by Rasty to show retaliatory motive are without merit. Moreover, no adverse ultimate employment decision was taken against Plaintiff Rasty. As stated above, an investigation into alleged wrongdoings does not equal an adverse ultimate employment decision. *Felton,* 315 F.3d at 487. Plaintiff has failed to establish a causal connection between the investigation into his alleged misconduct and the grievance he filed against Defendant Burton. Thus, the Court finds that Plaintiff Rasty has failed to establish a prima facie case for retaliation.

Finally, Defendants' proffered reason for the investigation, falsifications by Rasty, is an entirely legitimate, non-discriminatory reason for the actions taken. As stated above, "the plaintiff has the burden of proving "but for" the

discriminatory purpose he would not have [had the action taken against him]." *Pineda v. United Parcel Serv.*, No. 03-50268 (5th Cir. Dec. 30, 2003); *Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir. 1996) (no liability exists for unlawful retaliation if the action would have occurred anyway even in the absence of the protected conduct). After all, Rasty states in his deposition that misconduct is a proper issue that needs to be addressed in the context of publication records. Rasty thus admits that such investigative allegations are both reasonable and legitimate in such contexts. In fact, Plaintiff Rasty's co-plaintiff in this case, Plaintiff Cardenas-Garcia, submitted two of Rasty's papers to Defendant Burton for Burton's judgmental review of whether there was misconduct. The Court finds that the evidence is insufficient to show Defendant Burton was retaliating in the investigation of Rasty's alleged misconduct. In relation to qualified immunity, Rasty has not shown that all reasonable persons similarly situated to the Individual Defendants' positions would have acted differently under the circumstances and not investigated the issue.

Related to this incident, Rasty complains that his due process rights were violated in the initial proceedings of the investigation. The report of the UTAC in August of 2001 references some of the alleged due process violations that occurred early on in the investigation along with some appearances of bias. It is unclear if the UTAC was referencing violations of Texas Tech policies when it discusses possible due process violations, or if the UTAC believed constitutional due process had been violated. The Court believes the UTAC was likely referencing the former. As the UTAC's discussion of possible bias by the Provost and others in the process, appearance of bias by

faculty members who recommend termination of tenured professor does not violate due process rights. *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985). As to the issue of whether 30 days had elapsed before the committee was convened, the Court believes that Texas Tech University is in the best position to determine whether its policy guidelines should be strictly adhered to in investigative proceedings.

Moreover, there is not a violation of due process every time a university violates its own rules and procedures unless the action violates federal constitutional grounds. *See Levitt,* 759 F.2d 1224; *Brown v. Texas A&M Univ.,* 804 F.2d 327 (5th Cir. 1986) (failure of a state agency to comply with its internal regulations is insufficient to establish a violation of due process). The record reveals that Rasty sought an extension of time in an August 30, 1999 e-mail so that he could gather all needed evidence, and the record reveals that the extension was granted. The committee's report shows that Plaintiff Rasty submitted a binder "containing numerous documents" for the committee's review and that "Rasty provided information to defend himself and to clarify his charge of malicious intent against [Defendant] Burton." The report also shows that Rasty later presented "additional information."

Rasty further complains of due process violation occurring because of possible meetings between Defendant Burton and the chair of the committee. Any deprivation was remedied in subsequent proceedings in which Plaintiff Rasty was allowed to present all the evidence he wished to advance. More importantly, however, no ultimate adverse employment action was ever taken against Plaintiff Rasty and the final outcome was in his favor.

Finally, because of the multiple layers of process provided to Rasty, the Court finds that the risk of erroneous deprivation of his job was minimal. The low risk of an erroneous final decision being made "further erodes [a plaintiff's] claim that he deserved more process." *Williams v. Texas Tech Univ. Health Sciences Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993) (a district court properly grants summary judgment on all procedural due process claims upon a finding that the risk of erroneous deprivation is minimal). In any event, this Court finds that Plaintiff Rasty received all the process due him.[8]

The second incident that Plaintiff Rasty complains of that falls within the limitations period involves an alleged attempt by Defendant Burton to add prejudicial material to Rasty's tenure-review materials. As stated above in the facts, e-mails were exchanged between the tenured faculty members, including Defendant Burton, as to what should or should not be included in the tenure-review materials. Plaintiff Rasty was also a recipient of the e-mails. Defendant Burton and another faculty member wanted to include some of the misconduct issues within Plaintiff Rasty's tenure-review materials. The reason proffered for attaching such information was that Plaintiff Rasty had attached the findings of the UTAC to the materials. However, Defendant Burton and the other faculty member felt that in all fairness the entire record of the investigation should be attached, including the initial investigative committee's findings, etc. Rasty felt that only the UTAC

[8] Additionally, any due process violations which may have occurred early on in the investigation are barred if they occurred before May 15, 2001. The record reveals that the complained-of conduct for which due process violations are alleged occurred prior to May 15, 2001.

findings were important. Even though the UTAC report contained the entire record, the copy Rasty attached basically contained only the final findings. Furthermore, the final findings referenced materials not attached by Rasty. However, Rasty believed that all "the other stuff" could be interpreted unfavorably against him. In the end it was determined that nothing would be added. The research misconduct issues were not included in Rasty's review materials.

The Court finds that Defendant Burton has proffered a legitimate, nondiscriminatory reason for wanting to add the materials – to furnish the whole story and materials referenced by Rasty's attached document. Other than his conclusory allegations, Rasty has not shown any discriminatory reasons for Defendant Burton's request to include the materials. Additionally, the materials were not included, nor was any ultimate adverse employment action taken. Finally, in relation to qualified immunity, when the entire circumstance is viewed rather than just Plaintiff

Rasty's conclusory claims, it is apparent that Defendant Burton did not act beyond the bounds of all reasonable officials under the same circumstances. After all, the reason Defendant Burton requested that the material be added was to give a full account in the record and not just the final report offered by Plaintiff Rasty.

The third allegation that falls within the limitations period is Plaintiff Rasty's contention that he lost the position of sponsor for a student organization and thus lost an opportunity for service, which is factored into the annual reviews. Such action does not amount to an adverse employment decision because it has only a tangential effect upon Rasty's employment status. *See Burger,*

168 F.3d at 878; *Mattern*, 104 F.3d 702. The position itself does not pay a salary. Moreover, a plaintiff's subjective view that a demotion has occurred is not enough to constitute an adverse employment action. *Forsyth v. City of Dallas,* 91 F.3d 769, 774 (5th Cir. 1996). Rasty's loss of the advisor position did not result in the loss of benefits as a professor because he remained on the faculty following the change in sponsorship. Succinctly stated, no adverse ultimate employment decision occurred. Nor has Plaintiff Rasty produced any evidence that would show any discriminatory motive in Defendant Burton's alleged action. Most importantly, he has not presented any evidence that Defendant Burton made the decision rather than the students themselves. Thus, no action lies.

Plaintiff Rasty also complains of salary increases. He alleges that he did not receive a *substantial* raise one year sometime in the 1990's. He is not sure as to which year it was but believes it was in 1997 or 1998. Rasty admits in his deposition that he did actually receive a raise that year. His disagreement is with the amount. Regardless, the action was discrete and is time-barred. Rasty also complains that the amount of all his pay increases were lower than they should have been because of discriminatory reasons. However, Rasty admits in his deposition that he has been preoccupied with grievance and legal matters over the last few years and thus unable to devote himself to his job in a way that would allow him to earn higher pay increases. Such reasons have nothing to do with discriminatory intent on behalf of the Individual Defendants. Moreover, the record suggests that Anglo faculty members received lower increases than Rasty and that another Iranian-born professor received an increase that was greater than that given to many Anglo professors,

thus again bolstering Defendants' contention that Rasty received his pay raises in amounts based on legitimate, non-discriminatory reasons. A dispute over the quantum of pay increases is not an actionable adverse employment activity, especially when nothing in the record shows that the defendant was obligated to give the same dollar amount or same percentage increase to each professor. *See Harrington,* 118 F.3d at 366; *see also Williams,* 6 F.3d at 293 (a professor's interest in a specific level of income does not outweigh the state's significant interest in having reasonable discretion).

The Court finds that Plaintiff Rasty has not met his burden in establishing a prima facie case of discrimination based on his national origin or retaliation as it relates to his salary increases. The Court further finds that even if Rasty had met his burden, Defendants' proffered reasons for the amounts are legitimate and non-discriminatory. In relation to qualified immunity, Rasty has not shown that all reasonable persons similarly situated would have acted differently under the circumstances.

As to the Plaintiffs' allegations of substantive due process violations in their pay increases, at some point the linkage between the due process clause and the understanding as to a government employee's salary become uncertain enough to justify qualified immunity for officials accused of breaking that link. *Williams,* 6 F.3d at 293-94.

The Court further finds that Plaintiff Rasty has not shown that the Individual Defendants violated clearly established statutory or constitutional rights. Plaintiff Rasty, like Plaintiff Cardenas-Garcia, advances may conclusory allegations that are shown to be unsubstantiated upon

a closer inspection of the record and the Plaintiffs' depositions. This circuit has long held that a plaintiff's subjective belief, no matter how genuinely held, without more, is not a substitute for admissible summary judgment evidence. Moreover, almost all of the complained-of comments and conduct occurred more than two years before the Individual Defendants were sued. Even if Rasty had made his prima facie case for his respective claims, he has failed to establish that the reasons proffered for the alleged conduct of the Individual Defendants were pretextual. Moreover, in relation to qualified immunity, there is no evidence in the record to even suggest that the actions of the Individual Defendants were objectively unreasonable under the circumstances as to any claim advanced by Plaintiff Rasty. The Individual Defendants submit, and the Court agrees, that Rasty has not submitted relevant, admissible evidence to establish that he can meet the requirements for individual liability. For the foregoing reasons and discussion, summary judgment is **GRANTED** for Defendants Burton and Marcy, individually, as to Plaintiff Rasty's claims against them.

CONCLUSION

Plaintiffs' Title VII claims against the Individual Defendants are dismissed for failure to state a claim upon which relief can be granted.

As to Plaintiffs' remaining claims under § 1981 and §1983, for the reasons discussed above, the Court finds that most of the Plaintiffs' claims are barred by limitations. Furthermore, for those claims that possibly would survive a limitations defense, the Plaintiffs have failed to show that the Individual Defendants have violated their

clearly established statutory or constitutional rights. More precisely, the Court finds that Plaintiffs have failed to make their prima facie case in relation to all elements required and enumerated above for their claims which are not time-barred for national origin discrimination, retaliation, harassment, and violations of due process.

Additionally, the Court finds that even if given a very liberal interpretation in regard to meeting their prima facie cases, the Plaintiffs have failed to show that the reasons advanced by the Individual Defendants were anything other than legitimate, non-discriminatory reasons, and without pretext. Finally, in relation to the second prong of qualified immunity, the Court finds that the Plaintiffs have failed to show that Defendants Burton and Marcy behaved in an unreasonable manner under the circumstances and facts of this case. It cannot be said that all reasonable officials would have behaved differently under similar facts and circumstances. Although Plaintiffs' Complaint makes many conclusory allegations, it is obvious to the Court from the record before it that those conclusory allegations do not overcome the Individual Defendants' qualified immunity. Nor could a reasonable jury find otherwise; thus, no genuine issue of fact exists in relation to Defendants Burton's and Marcy's entitlement to immunity from suit.

As set forth herein and in previous orders of the Court, Plaintiffs' claims against Defendants Burton and Marcy in their official capacities have been dismissed; summary judgment for Defendants Burton and Marcy in their individual capacities has been granted; Plaintiffs' monetary claims against Defendant Texas Tech University have been dismissed; and Plaintiffs' Title VII claims and claims for declaratory and injunctive relief under § 1981

and § 1983 remain pending, subject to the Court's disposition of Texas Tech University's Motion for Summary Judgment filed December 15, 2003.

SO ORDERED this 20th day of January, 2004.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 1981 of 42 U.S.C. provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to

the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

(b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Section 1983 of 41 U.S.C. provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. . . .

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(2)

Supreme Court, U.S.
FILED
JUL 6 - 2005
OFFICE OF THE CLERK

No. 04-1239

In the Supreme Court of the United States

JAIME CARDENAS-GARCIA AND JAHAN RASTY,
Petitioners,

v.

TEXAS TECH UNIVERSITY, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Court should deny the petition for writ of certiorari because it does not present an important question of federal law over which the courts of appeals conflict. The courts of appeals have reached a near-consensus regarding the standard for "adverse employment actions" in Title VII retaliation claims, with ten of the twelve circuits requiring that any such action be "material," "serious and tangible," or "significant." And while the Fifth Circuit's "ultimate employment decision" test is worded somewhat differently from the majority rule, the Solicitor General has observed that "it is unclear that there is any real difference in practice" between the two standards. Indeed, a review of case law from other circuits shows that it is far from certain that Petitioners would have viable claims in those jurisdictions under the specific facts of this case.

Underscoring the insignificance of this conflict, the Court has already denied review on this question once during this Term. And just last Term, the Court declined to review three Fifth Circuit cases applying the same "ultimate employment decision" standard that Petitioners challenge here. Nothing about the Fifth Circuit's unpublished, non-precedential decision in this case warrants a sudden change in course. Consistent with its recent dispositions of petitions raising this issue, the Court should deny review.

Petitioners' second question raises a false conflict between Fifth and Eleventh Circuit precedent regarding whether disproportionate pay raises present actionable discrimination claims under Title VII. Precedent from both courts states that denials of "significant" raises are actionable. To the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in discrimination cases, it is at most a misapplication of circuit precedent that does not warrant review.

Finally, this case is inappropriate for the Court's review because numerous alternative grounds for affirmance exist that would require the Court to engage in a cumbersome, case-specific analysis

of Respondents' various defenses. Accordingly, the Court should deny the petition.

STATEMENT OF THE CASE

1. Respondents incorporate by reference the factual background set forth in the district court's January 20, 2004 Order. Pet. App. 15a-30a.

2. In December 2002, Petitioners filed suit against Texas Tech University ("TTU") alleging national origin discrimination and retaliation in violation of Title VII and violation of due process pursuant to 42 U.S.C. §1983. R1-19. In June 2003, Petitioners amended their complaint to add: (1) Respondents Thomas Burton and William Marcy as named defendants; (2) a claim of harassment under Title VII against TTU; and (3) claims of national-origin discrimination, retaliation, and harassment under 42 U.S.C. §§1981 and 1983 against all Respondents. R93-122. The district court subsequently granted TTU's partial motion to dismiss Petitioners' claims for monetary damages against TTU under §§1981 and 1983 as barred by Eleventh Amendment immunity. R191-97.

In October 2003, Respondents Burton and Marcy filed a motion for summary judgment. R287. On January 20, 2004, the district court granted this motion, dismissing all of Petitioners' claims against Burton and Marcy on numerous independent, alternative grounds. Pet. App. 14a-69a.

First, with respect to Cardenas-Garcia's discrimination and retaliation claims based on his annual performance review, the district court held that: (1) Cardenas-Garcia had not established the "adverse employment action" element of a prima facie case for either claim because the review was not an "ultimate employment decision"; (2) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the review—Cardenas-Garcia's poor work performance—and there was no genuine issue of material fact that the reason was pretextual; and

(3) as an alternative ground on the discrimination claim, the evidence did not show that Cardenas-Garcia was reviewed differently than someone in similar circumstances because the professor with whom he compared reviews had other accomplishments that justified the better review. Pet. App. 52a-53a.

With respect to Rasty's discrimination and retaliation claims based on the investigation of academic-dishonesty charges against him, the district court held that: (1) Rasty had not established the "adverse employment action" element of a prima facie case for either claim because the investigation—which found inaccuracies in Rasty's publication record, but not sanctionable "academic misconduct"—did not result in an "ultimate employment decision"; (2) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the investigation—inaccurate statements regarding Rasty's publications—and there was no genuine issue of material fact that the reason was pretextual; (3) as an alternative ground on the discrimination claim, the evidence did not show that Rasty was investigated differently than someone in similar circumstances because the professor with whom he compared himself had admitted and corrected mistakes in his academic record, thereby obviating the need for an investigation; and (4) as an alternative ground for the retaliation claim, Rasty had not established the causation element of a prima facie case because he offered only conclusory statements of retaliatory motive. Pet. App. 59a-61a.

And with respect to Petitioners' discrimination and retaliation claims that they received proportionately lower pay raises than some of their Anglo-American colleagues, the district court held that: (1) claims predicated on many of the raises were barred by the statute of limitations; (2) alternatively, Petitioners had not established the "adverse employment action" element of a prima facie case for either claim because the variations in pay raises did

not qualify as "ultimate employment decisions"; and (3) alternatively, Burton and Marcy had produced evidence of a legitimate, non-discriminatory reason for the raise amounts—they were justified by differences in performance—and there was no genuine issue of material fact that the reason was pretextual. Pet. App. 51a, 53a-54a, 65a-66a.

Finally, as to all of Petitioners' claims, the district court held that Burton and Marcy were entitled to qualified immunity. Specifically, the court held that Petitioners had failed to show violation of a clearly established right and, alternatively, they had not shown that Burton's and Marcy's actions were objectively unreasonable. Pet. App. 56a-57a, 66a-67a.

In December 2003, TTU filed its motion for summary judgment. R956. On January 22, 2004, the district court granted TTU's motion, dismissing all of Petitioners' claims against TTU for essentially the same reasons provided in the Order granting Burton and Marcy's summary-judgment motion. Pet. App. 4a-13a. The district court entered final judgment for all Respondents on January 22, 2004. R1681.

3. In an unpublished, per curiam opinion, the court of appeals affirmed the district court's judgment. Pet. App. 1a-3a. The court of appeals held that Cardenas-Garcia's annual review and the investigation into charges of academic dishonesty against Rasty did not satisfy the "adverse employment action" element of a prima facie case because they were not ultimate employment decisions. Pet. App. 2a. With respect to Petitioners' claims based on lower pay raises, the court of appeals reviewed its jurisprudence and observed "we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the [adverse employment action] requirement." Pet. App. 3a.

REASONS TO DENY THE PETITION

I. THE QUESTION REGARDING WHAT CONDUCT QUALIFIES AS AN "ADVERSE EMPLOYMENT ACTION" IN A TITLE VII RETALIATION CLAIM DOES NOT WARRANT REVIEW.

A. Petitioners Overstate the Extent of the Conflict.

Petitioners overstate the extent of the circuits' disagreement regarding what constitutes an "adverse employment action" sufficient to state a prima facie case of retaliation under Title VII. In fact, the circuits have now reached near-unanimity on the standard for such actions.

1. Ten of the twelve circuits currently require a plaintiff to show that he suffered a retaliatory action that meets a threshold of materiality or significance. The First, Second, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits use the term "material."[1] The Third and Eleventh Circuits apply essentially the

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1. *Gu v. Boston Police Dep't*, 312 F.3d 6, 14 (CA1 2002) (holding that "[t]o be adverse, an action must materially change the conditions of plaintiffs' employ"); *Fairbrother v. Morrison*, No. 03-9242-CV, 2005 WL 1389894, at *13 (CA2 June 14, 2005) (explaining that "[a]n adverse employment action is a 'materially adverse change' in the terms and conditions of employment" (citations and internal quotations omitted)); *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 797, 800 (CA6 2004) (en banc) (reaffirming circuit standard that plaintiff must show "a materially adverse change in the terms of her employment" (citations and internal quotations omitted)); *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307, at *6 (CA7 June 15, 2005) (requiring retaliation plaintiff to show that "he suffered a materially adverse employment action"); *Bradley v. Widnall*, 232 F.3d 626, 632 (CA8 2000) (holding that "[a]n adverse employment action is exhibited by a *material* employment disadvantage" (emphasis in original)); *Duncan v. Manager, Dep't of Safety*, 397 F.3d 1300, 1314 (CA10 2005) (noting that "[a]n adverse employment action must be materially adverse to the

same standard using different language, requiring the adverse action to be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment."[2] And while the Fourth Circuit ostensibly demands only a showing that the employer's actions "adversely affected 'the terms, conditions, or benefits' of the plaintiff's employment," *Von Gunten v. Maryland*, 243 F.3d 858, 865 (CA4 2001), in practice it has rejected actions it did not deem "significant," *id.*, at 868 (finding poor performance reviews and change in job assignments were not adverse actions because court could not discern "any significant difference" between earlier performance review and challenged review and change in job assignment was not "truly . . . significant").[3] Reviewing these various standards, the Eleventh Circuit has concluded that, regardless of the language used, "[a]s

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employee's job status" (citation and internal quotations omitted)); *Forkkio v. Powell*, 306 F.3d 1127, 1131 (CADC 2002) (describing circuit standard that "an employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities").

2. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (CA3 1997); *Stavropoulos v. Firestone*, 361 F.3d 610, 617 (CA11 2004) (citation and internal quotations omitted), *cert. denied*, 125 S. Ct. 1850 (2005).

3. *See also Brackman v. Fauquier County*, 72 Fed. Appx. 887, 893 (CA4 2003) (per curiam) (holding that plaintiff did not show adverse employment action because "we fail to see how [the challenged action] had a 'significant detrimental effect' on [the plaintiff]") (citation omitted); *Becker v. Gannett Satellite Info. Network, Inc.*, 10 Fed. Appx. 135, 140 (CA4 2001) (per curiam) (holding that plaintiff did not show adverse employment action where employer "did not significantly alter her job responsibilities in any detrimental or significant way").

applied, these standards are essentially interchangeable." *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (CA11 2001).

The Fifth Circuit has articulated a different threshold, requiring the employee to show that he suffered an "ultimate employment decision," which "include[s] acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (CA5 1997) (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (CA5 1995)). Elaborating on this standard, the court has explained that "[a]n employer's action does not rise to the level of an 'adverse employment action' when it fails to have more than 'mere tangential effect on a possible future ultimate employment decision.'" *Mota v. Univ. of Tex. Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (CA5 2001) (quoting *Walker v. Thompson*, 214 F.3d 615, 629 (CA5 2000)). Accordingly, the Fifth Circuit standard is largely the same as the standard predominant among other circuits, differing only in the margin between "material" or "serious" employment actions and actions that concern or have more than a tangential effect on hiring, granting leave, discharging, promotions, and compensation.

Finally, the Ninth Circuit alone adopts a broader interpretation of what constitutes an adverse employment action. In *Ray v. Henderson*, 217 F.3d 1234, 1243 (CA9 2000), it held that "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity."

2. Petitioners incorrectly describe the circuits' standards as more divergent by relying on the Ninth Circuit's erroneous and dated assessment of circuit law in *Ray*. Pet. 15. In that case, the court claimed that its "expansive view" of actionable adverse employment actions was shared by the First, Seventh, Tenth, Eleventh, and District of Columbia Circuits. *Ray*, 217 F.3d, at 1241-42; *see also* Pet. 15. But, as previously discussed, all of these courts now require a showing of "material" or "serious and

tangible" actions to establish a prima facie case of retaliation. *See supra* nn.1, 2.

Moreover, an examination of the cases relied on by the Ninth Circuit further demonstrates why *Ray*'s description of the state of circuit law on this issue in 2000 is either outdated or simply wrong. In *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (CA1 1994) (per curiam), the First Circuit stated in dicta that, apart from discharge, "other adverse actions" covered by Title VII include, *inter alia*, "disadvantageous transfers or assignments" and "toleration of harassment." But eight years later, notwithstanding *Wyatt*'s dicta, the First Circuit specifically rejected a retaliation claim based on disadvantageous transfer and toleration of harassment on the ground that those particular actions in that case did not satisfy the Court's "materially adverse" standard. *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 22-27 (CA1 2002).

Similarly, in *Knox v. State*, 93 F.3d 1327, 1334 (CA7 1996), the Seventh Circuit stated in dicta that there is "nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee." But in the nine years since *Knox* was decided, the court has decidedly distanced itself from this dicta, embracing the much stricter "materially adverse" standard. *Beamon*, 2005 WL 1399307, at *6; *see also Markel v. Bd. of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 911 (CA7 2002) (holding plaintiff's claims that she was "denied 'better' equipment, the ability to travel and make presentations, and removed from certain accounts that caused her not to receive bonuses" were not material, and thus, not actionable); *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 729 (CA7 2001) (holding that "unfair reprimands or negative performance evaluations, unaccompanied by some tangible job consequence, do not constitute adverse employment actions").[4]

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4. Like the Ninth Circuit, Petitioners also misplace reliance on the *Wyatt* and *Knox* dicta to describe—incorrectly—the current state of

The Tenth Circuit cases cited in *Ray* do not align that court with the Ninth Circuit's broad definition of adverse employment actions. In *Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1507 (CA10 1996), the plaintiff was actually denied severance benefits—a compensation decision that would be actionable in any circuit. And, although the Tenth Circuit held in *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996), that a criminal prosecution could constitute an adverse employment action because of its impact on future hiring, the court has since effectively limited *Berry* to its facts by declining to extend it to other situations not deemed materially adverse. *See, e.g.*, *Dick v. Phone Directories Co.*, 397 F.3d 1256, 1269 (CA10 2005) (declining to extend *Berry* to filing of police report against employee); *Dirusso v. Aspen Sch. Dist. No. 1*, 123 Fed. Appx. 826, 839 (CA10 2004) (declining to extend *Berry* to negative job reference given to future employer); *Aquilino v. Univ. of Kan.*, 268 F.3d 930, 934 (CA10 2001) (declining to extend *Berry* to removal of plaintiff from committee, notwithstanding impact on future employment). Finally, as discussed previously, the Tenth Circuit now requires a "materially adverse" employment action to state a prima facie case of retaliation. *Duncan*, 397 F.3d, at 1314.

The Ninth Circuit simply misread the Eleventh Circuit's decision in *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (CA11 1998). In *Ray*, the Ninth Circuit described *Wideman* as holding that actionable adverse employment actions "include" matters such as "requiring plaintiff to work without lunch break, giving her a one-day suspension, soliciting other employees for negative statements about her, changing her schedule without notification, making negative comments about her, and needlessly delaying authorization for medical treatment." *Ray*, 217 F.3d, at 1241-42 (citing *Wideman*, 141 F.3d, at 1456). In fact, the Eleventh

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circuit law on this issue. Pet. 17.

Circuit held that these actions "*considered collectively* are sufficient to constitute prohibited discrimination" under Title VII's anti-retaliation provision. 141 F.3d, at 1456 (emphasis added). The court specifically declined to decide "whether anything less than the totality of the alleged reprisals would be sufficient." *Id.*

Finally, in *Passer v. American Chemical Society*, 935 F.2d 322, 330-31 (CADC 1991), the District of Columbia Circuit held that an adverse employment action could include an act that affected future employment prospects. But that court has since specified that any such effect must be a "materially adverse consequence[]." *Forkkio*, 306 F.3d, at 1131.[5]

Indeed, Petitioners' own authority acknowledges that the "emerging trend" among the circuits is a movement toward the more restrictive "materially adverse" standard. *See* Rosalie Berger Levinson, *Parsing the Meaning of "Adverse Employment Action" in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing?*, 56 OKLA. L. REV. 623, 636 & n.29 (2003). Thus, contrary to Petitioners' assertion that this conflict is "intractable" and "entrenched," this trend suggests that circuit law is evolving toward a consensus, and, therefore, does not warrant review by the Court.

3. In sum, the conflict raised by Petitioners is extremely lopsided, with all almost all circuits requiring that an adverse

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5. The Ninth Circuit also erroneously aligned the Eighth Circuit with the Fifth Circuit as using the "ultimate employment decision" standard. *Ray*, 217 F.3d, at 1242. Although the Eighth Circuit has used those words to describe actionable conduct, it has defined that phrase to include any "tangible change in duties or working conditions that constituted a material employment disadvantage." *Manning v. Metro. Life. Ins. Co.*, 127 F.3d 686, 692 (CA8 1997); *see also Von Gunten*, 243 F.3d, at 864 (recognizing that Eighth Circuit actually uses "material disadvantage" standard rather than "ultimate employment decision" standard).

employment action be "material," "serious and tangible," or "significant" to state a retaliation claim. And the Fifth Circuit's rule ostensibly differs from this standard only in the narrow margin between such "material" employment actions and "ultimate employment decisions" that have more than a tangential effect on hiring, granting leave, discharging, promotions, and compensation.

B. The Difference Between the Fifth Circuit Rule and the Majority Rule Exists More in Principle than in Practice.

The small and somewhat vague distinction between the Fifth Circuit's "ultimate employment decision" standard and the materiality/significance standard used by almost all other circuits does not present an "important" conflict that merits certiorari review. *See* SUP. CT. R. 10. The difference exists more in principle than in practice, as evidenced by Petitioners' failure to show a clear divergence in the application of these standards to the facts of this case.

1. Petitioners rely on the Solicitor General's comment that "[t]he courts of appeals have *articulated* different standards for what types of employment conduct are actionable" under Title VII's anti-retaliation provision. Pet. 17 (quoting Brief for Respondent in Opposition at 7, *Noland v. Henderson*, 532 U.S. 1019 (2001) (mem.) (No. 00-1259) (emphasis added)). But the Solicitor General has since opined that "it is unclear that there is any real difference in practice between the 'ultimate employment decision' standard . . . and the 'adverse employment action' standard" employed by most circuits. Brief for Respondent in Opposition at 5, *Vasquez v. Snow*, 541 U.S. 936 (2004) (mem.) (No. 03-887). In other words, although the circuits may employ different verbal formulations of the standard for evaluating alleged retaliatory actions, application of those standards yields little difference in results.

The Fourth Circuit echoed this assessment in *Von Gunten*, noting that "[s]ometimes the practical differences between these

two standards are difficult to discern" and the distinction results in a "sometime slight real world difference." 243 F.3d, at 864. And although the Fourth Circuit stated that the standards could produce different results if "strictly applied," *id.*, they would not have yielded disparate results in *Von Gunten*. The court rejected the plaintiff's claims that denying her use of a state vehicle, downgrading her annual review, changing her job assignments, mishandling her requests for leave, and failing to deal adequately with her complaints of harassment constituted, either individually or collectively, adverse employment action sufficient to state a retaliation claim. *Id.*, at 867-70.

The "slight real world difference" in these standards largely results from the fact that courts are resolving this issue experientially by deciding particular cases on their peculiar facts. *See White*, 364 F.3d, at 799 (stating that "we have over the last twenty years given some shape to the definition by describing the kinds of material adverse employment actions that rise above the level of trivial"); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587 (CA11 2000) (holding that "[w]hether an action is sufficient to constitute an adverse employment action for purposes of a retaliation claim must be determined on a case-by-case basis").[6] Even the Fifth Circuit's seemingly more categorical approach can yield varying results depending on the circumstances. For example, although the court held in this case that Petitioners' poor

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6. *See also Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (CA10 1999) (noting that "we take a case-by-case approach in determining whether a given employment action is 'adverse'"); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 49 (CA1 1999) (observing that "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry"); *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (CA2 1997) (commenting that "courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse'").

performance reviews did not constitute "ultimate employment decisions," Pet. App. 2a, in another case it assumed that a low performance evaluation was an "ultimate employment decision" where it automatically postponed an annual raise. *See Felton v. Polles*, 315 F.3d 470, 488 (CA5 2002). Consequently, the circuits' different "articulations" of the standard for adverse employment actions are less relevant than how they are applied in a given case.

2. The limited practical effect of these differently phrased standards is reflected in Petitioners' unconvincing attempt to show that the conflict is necessarily outcome-determinative in this case. Pet. 20-22.

Petitioner Cardenas-Garcia alleges a conflict between the Fifth Circuit's decision that one of his annual reviews was not an adverse employment action and cases from four other circuits. Pet. 20-21 (citing *Wyatt v. City of Boston*, 35 F.3d 13, 16 (CA1 1994) (per curiam); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (CA9 1987); *Cardenas v. Massey*, 269 F.3d 251, 263-64 (CA3 2001); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (CA8 1997)). Thus, he asserts that his retaliation claim predicated on his annual review would have been viable in these jurisdictions. Pet. 21.

But the viability of Cardenas-Garcia's retaliation claim is not simply a matter of geography. All of these courts—including the Ninth Circuit—have held under certain circumstances that negative performance reviews did not qualify as adverse employment actions. *See Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (CA1 1998) (holding that critical reports on plaintiff's productivity were not adverse employment actions); *Weston v. Pennsylvania*, 251 F.3d 420, 430-31 (CA3 2001) (holding that written reprimands were not actionable adverse employment actions when plaintiff did not show material change in terms and conditions of employment); *LaCroix v. Sears, Roebuck, & Co.*, 240 F.3d 688, 691-92 (CA8 2001) (holding that performance review was not actionable where plaintiff did not show it resulted

in a material employment disadvantage); *Lyons v. England*, 307 F.3d 1092, 1118 (CA9 2002) (holding that lower evaluation was not actionable where it did not translate into further adverse decision).[7] And, as discussed previously, the Fifth Circuit has suggested that a performance review could be actionable if it directly affected compensation. *See Felton*, 315 F.3d at 488.

These divergent assessments of whether performance reviews present actionable retaliation claims naturally result from the fact-specific inquiry courts conduct to determine whether a particular act is "material" or "reasonably likely to deter employees" or has "more than a mere tangential effect" on future employment decisions. As such, Cardenas-Garcia's claim regarding his annual review—which apparently is based on a single comment that Burton made in his

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7. Indeed, *all* of the other circuits have held likewise. *See, e.g.*, *Fairbrother v. Morrison*, No. 03-9242-CV, 2005 WL 1389894, at *14 (CA2 June 14, 2005) (holding that negative evaluation was not adverse employment action); *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 189 (CA4 2004) (holding that negative employment evaluation did not "rise[] to the level of an adverse employment action"); *Primes v. Reno*, 190 F.3d 765, 767 (CA6 1999) (holding that low evaluation was not adverse employment action under circumstances of that case); *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307, at *6 (CA7 June 15, 2005) (observing that "although negative performance evaluations may be evidence of discrimination, they are not alone considered to be actionable adverse employment actions); *Amro v. Boeing Co.*, 232 F.3d 790, 799 (CA10 2000) (holding that lower performance evaluation was not adverse employment action); *Davis v. Town of Lake Park*, 245 F.3d 1232, 1240 (CA11 2001) (holding that negative job performance memoranda did not constitute actionable adverse employment actions); *Brown v. Brody*, 199 F.3d 446, 458 (CADC 1999) (noting that a "thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions").

evaluation, Pet. App. 18a-19a—does not present a clear circuit conflict that merits review.

For the two remaining adverse actions raised by Petitioners (disproportionate pay raises and disciplinary investigations), they can cite only an alleged conflict with two cases from the Ninth Circuit, which alone among the circuits has adopted a broad definition of adverse employment action. Pet. 21-22 (citing *Ray*, 217 F.3d, at 1243-44; *Hashimoto v. Dalton*, 118 F.3d 671, 676 (CA9 1997)). And even then, neither of these cases directly conflicts with the Fifth Circuit's decision below.

In *Ray*, the Ninth Circuit held that a *reduction* in the plaintiff's pay constituted an adverse employment action. 217 F.3d, at 1244. This holding does not conflict with Fifth Circuit precedent generally, which holds that a reduction in pay qualifies as an actionable adverse employment action. *Tyler v. Union Oil Co.*, 304 F.3d 379, 397 (CA5 2002). Nor does *Ray*'s holding regarding pay *reductions* present an actual conflict with this case, in which Petitioners complain that the amount of the pay *raises* they received constitutes an adverse employment action. Pet. App. 54a, 65a-66a.[8]

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8. Even if *Ray* could be broadly read to mean any disproportionate adjustment in pay is actionable, it still does not present a circuit conflict. The Fifth Circuit does not categorically reject retaliation claims predicated on disproportionate pay raises. *Harrington v. Harris*, 118 F.3d 359, 366 (CA5 1997). Indeed, such actions certainly represent "compensation" determinations, which the Fifth Circuit has always considered "ultimate employment decisions." *See Mattern*, 104 F.3d at 707. Accordingly, to the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in retaliation cases, *see* Pet. App. 3a, it is at most a misapplication of circuit precedent that does not warrant review. *See infra* Part II.

In *Hashimoto*, the Ninth Circuit held that a negative job reference could constitute an adverse employment action despite the fact that it "turned out to be inconsequential" because the prospective employer would not have hired the plaintiff even without the negative reference. 118 F.3d, at 676. Rasty claims that *Hashimoto* conflicts with the court of appeals's holding that TTU's investigation into academic-dishonesty charges against him was not an ultimate employment decision. Pet. 21-22. There are several problems with this purported conflict.

As an initial matter, the negative job reference in *Hashimoto* and the academic investigation into Rasty's statements about his publications are so factually dissimilar that a genuine conflict does not exist. Rasty nevertheless tries to present a conflict in rationale, asserting that, in contrast to the job reference in *Hashimoto*, TTU's investigation was held not to be an adverse employment action because it cleared Rasty of academic misconduct, and thus was "inconsequential." *See* Pet. 21-22. But that was the *district court's* reasoning, Pet. 21-22; Pet. App. 59a; the Fifth Circuit simply held that an investigation did not qualify as an ultimate employment decision, Pet. App. 2a. That Petitioners are reaching back to the district court's opinion to try to establish a conflict with a factually inapposite decision further demonstrates that this case does not warrant the Court's review. Finally, exemplifying the limited practical difference between the "ultimate employment decision" standard and the materiality/significance standard, the Fifth Circuit's opinion in this case comports with decisions from other circuits holding that internal investigations are not actionable adverse employment actions. *See, e.g.*, *Peltier v. United States*, 388 F.3d 984, 988 (CA6 2004); *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1363-64 (CAFed 2002); *Jones v. Fitzgerald*, 285 F.3d 705, 714-15 (CA8 2002); *Von Gunten*, 243 F.3d, at 869. For these reasons, Rasty's claim regarding the academic-dishonesty investigation does not present a genuine conflict warranting review.

C. The Court Has Recently Declined to Review This Question.

Underscoring the unimportance of this issue, the Court has already declined to address it this Term in another case where it was squarely presented. *Stavropoulos v. Firestone*, 361 F.3d 610 (CA11 2004), *cert. denied*, 125 S. Ct. 1850 (2005) (Question Presented: "Should this Court grant certiorari to resolve the circuit split regarding the type of employer conduct that constitutes an 'adverse employment action' in a Title VII retaliation suit under 42 U.S.C. 2000e-3(a)?"). Since the Court denied review in *Stavropoulos* in April 2005, there have been no developments in the legal landscape that have transformed this issue into one that suddenly merits the Court's review.

Indeed, the Court has recently refused to review this question even when presented through the vehicle of a Fifth Circuit decision applying that court's "ultimate employment decision" standard. Just last Term, the Court denied review in three Fifth Circuit cases squarely presenting that issue.[9] There is nothing about the Fifth

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9. *Kang v. Bd. of Supervisors of La. State. Univ.*, 75 Fed. Appx. 974 (CA5 2003) (per curiam), *cert. denied*, 541 U.S. 903 (2004) (Question Presented: "Does section 704(a) of Title VII of the 1964 Civil Rights Act, which prohibits retaliation against an employee for filing a charge with the EEOC, permit an employer to engage in retaliatory action so long as that reprisal does not constitute an 'ultimate employment decision'?"); *Vasquez v. Snow*, 75 Fed. Appx. 275 (CA5 2003) (per curiam), *cert. denied*, 541 U.S. 936 (2004) (Question Presented: "Whether a plaintiff must show an ultimate employment action rather than an adverse employment action to establish a claim for retaliation under Title VII."); *Hernandez v. Crawford Bldg. Material Co.*, 321 F.3d 528 (CA5 2003) (per curiam), *cert. denied*, 540 U.S. 817 (2003) (Question Presented: "Do the anti-retaliation provisions of Title VII and the Age Discrimination in Employment Act, which forbid an employer from discriminating against an employee for seeking to enforce his or her rights under Title VII and

Circuit's unpublished, non-precedential opinion in this case that makes it a more appropriate vehicle to address this question.[10] Consistent with its treatment of this unimportant issue over the last two terms, the Court should again deny review.

II. THE QUESTION WHETHER DISPROPORTIONATE PAY RAISES QUALIFY AS "ADVERSE EMPLOYMENT ACTIONS" IN A TITLE VII DISCRIMINATION CLAIM DOES NOT WARRANT REVIEW.

Petitioners also assert a conflict between the Fifth Circuit and the Eleventh Circuit as to whether disproportionate pay raises may constitute "adverse employment actions" in a Title VII discrimination claim. Pet. 27-29. But in reality, precedent from these courts is in accord on this issue, and the Fifth Circuit's non-precedential opinion in this case does not disturb that consensus.

In *Gillis v. Georgia Department of Corrections*, the Eleventh Circuit held that an employer's decision that "disentitles an employee to a raise *of any significance* is an adverse employment action under Title VII." 400 F.3d 883, 888 (CA11 2005) (emphasis added). Fifth Circuit law is similar. In *Harrington v. Harris*, the court held that certain variations in the percentage of merit pay increases among a university's faculty did not qualify as "adverse employment actions" because they "were not significant." 118 F.3d 359, 366 (CA5 1997). But, the court added, "[i]f Plaintiffs had received no merit pay increase at all or if the amount of such

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ADEA respectively, actually permit such retaliation so long as the employer's actions do not constitute an 'ultimate employment decision'?").

10. *See* Pet. App. 1a; 5TH CIR. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like).").

increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion." *Id.* Thus, precedent from the Eleventh Circuit and Fifth Circuit does not conflict on this point. Accordingly, to the extent the court of appeals's non-precedential opinion in this case rests on a categorical rule that disproportionate pay raises can never be actionable in discrimination cases, *see* Pet. App. 3a, it is at most a misapplication of circuit precedent that does not warrant review.

III. ALTERNATIVE GROUNDS FOR AFFIRMANCE MAKE THIS CASE AN INAPPROPRIATE CANDIDATE FOR REVIEW.

If the Court were to grant the petition, Respondents would defend the judgment below by advancing alternative grounds for affirmance raised in the Fifth Circuit briefing but not reached by that court. *See Blum v. Bacon*, 457 U.S. 132, 138 n.5 (1982) (noting that respondents "may rely upon any matter appearing in the record in support of the judgment below"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977) (explaining that respondents are "entitled under our precedents to urge any grounds which would lend support to the judgment below").

Although the court of appeals's disposition pretermitted consideration of numerous other defects in Petitioners' claims, a respondent may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). Although Respondents' strong arguments for affirming the judgment would be presented for this Court's review should it grant the petition, the existence of these alternative grounds for affirmance provides yet another reason why this case is an unsuitable vehicle for review of the questions urged by Petitioners.

The Court would become mired in a detailed record and evidentiary questions regarding whether Petitioners' claims of disparate treatment were founded on comparisons with "similarly situated" persons, whether Respondents had met their burden to show legitimate, non-discriminatory reasons for their actions, whether there is a genuine issue of material fact as to pretext, and whether Burton and Marcy were entitled to qualified immunity. Indeed, the bulk of the district court's opinion was dedicated to these issues rather than the "adverse employment action" question addressed by the Fifth Circuit. *See* Pet. App. 47a-69a. Because the issues related to the definition of "adverse employment action" concern only a portion of the district court's order as applied to a discrete set of facts, this case does not merit the Court's attention.

CONCLUSION

The Court should deny the petition for writ of certiorari.

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July 6, 2005

(3)

No. 04-1239

Supreme Court, U.S.
FILED
JUL 21 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAIME CARDENAS-GARCIA and JAHAN RASTY,

Petitioners,

v.

TEXAS TECH UNIVERSITY, THOMAS BURTON, individually and in his official capacity as Chair of the Mechanical Engineering Department at Texas Tech University; WILLIAM MARCY, individually and in his official capacity as Associate Dean and later Dean of the College of Engineering at Texas Tech University,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

This Court should grant certiorari on both questions presented. Respondents' brief in opposition confirms that the courts of appeal are in disarray regarding proper standards for actionable retaliation under § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), and actionable discrimination under § 703(a), 42 U.S.C. § 2000e-2(a).

The Fifth Circuit rejected Petitioners' retaliation claims because none of the acts at issue (lower salaries, unjustified poor performance reviews that resulted in disproportionately lower raises and salaries, and disciplinary investigations) constituted an "adverse employment action," which the Fifth Circuit requires to be an "ultimate employment decision." Pet. App. 2-3; *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708-09 (CA5 1997). A majority of the courts of appeals, although at times using the same "adverse employment action" phraseology, embrace a rationale and standard for retaliation claims that is materially different than that adopted by the Fifth Circuit. There is no consensus among the courts of appeal regarding the appropriate standard for analyzing retaliation claims; the difference in legal standards is entrenched and important; and the disparity in results among the circuits from the application of the varying standards is untenable.

The Fifth Circuit also rejected Petitioners' discrimination claims, applying its strict "ultimate employment decision" test. *See* Pet. App. at 3. Yet, the Eleventh Circuit has held that "actions that affect compensation are considered adverse employment actions," specifically finding that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII." *Gillis v. Ga. Dep't of Corrections*, 400 F.3d 883, 888 (CA11 2005). The Fifth Circuit here held the opposite.

This case is an ideal vehicle for resolving these splits of authority because the Fifth Circuit decided this case solely on the "ultimate employment decision" issue; there is no alternative basis for its holding. This Court should grant certiorari to bring needed clarity to these important questions.

I. Certiorari Should Be Granted To Resolve The Circuit Conflict Regarding The Proper Standard For Actionable Retaliation.

Contrary to Respondents' assertion (BIO 5-11), courts of appeal have not converged on a test for what constitutes actionable retaliation. In attempting to paper over the deep conflict that exists, Respondents assert two arguments: 1) that the "ultimate employment decision" test is "largely the same" as that used in most other circuits and differs only in the margin between "material" and "serious" employment actions required by some circuits and "ultimate" actions required by the Fifth Circuit; and 2) that case law has changed since the Ninth Circuit adopted an expansive standard that Respondents admit conflicts with the Fifth Circuit's strict test. These attempts to downplay the conflict are not persuasive; indeed, cases cited by Respondents plainly illustrate the intractable split regarding the appropriate standard for retaliation claims.

1. At base, this is a conflict over whether discrimination and retaliation claims are subject to the same "adverse action" standard, despite difference in language between the two provisions. Pet. 23-27; Pet. App. 70. The Fifth Circuit holds discrimination and retaliation claims are subject to the same standard, requiring an "adverse employment action" that actually is an "ultimate employment decision." Pet. App. at 2. Other circuits and the EEOC do not require even an adverse employment action, and certainly not an ultimate employment decision. *See, e.g., Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745 (CA7 2002) (Posner, J.) ("We do not mean to suggest . . . that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not.");[1] *Ray v. Henderson*, 217

[1] Another opinion by Judge Posner, *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (CA7 2002), uses adverse employment action language. Yet, the Seventh Circuit reads *Herrnreiter* as limiting *Stone*. *See Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1031, n.4 (CA7 2004) (noting *Herrnreiter* was decided post-*Stone* and "retaliation claims need not always involve an adverse action directly related to *employment*, just an adverse

(Continued on following page)

F.3d 1234, 1240-43 (CA9 2000) (adopting EEOC standard and "hold[ing] that an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity"); *U.S. Equal Employment Opportunity Comm'n Compliance Manual*, § 8, at 14 (May 1998) (opining that the retaliation provision "set[s] no qualifiers on the term 'to discriminate,' and therefore prohibit[s] *any* discrimination that is reasonably likely to deter protected activity."); *see also Noviello v. City of Boston*, 398 F.3d 76, 88-90 (CA1 2005) (deferring to EEOC standard when recognizing retaliatory harassment claim); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996) (rejecting view that retaliation claim must be based on "formal practices linked to an existing employer/employee relationship"); *Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 331 (CADC 1991) (retaliation is not limited "only to acts of retaliation that take the form of cognizable employment actions").[2]

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action by an employer of some kind, depending on the facts") (emphasis in original). Thus, Respondents' reliance on *Beamon v. Marshall & Ilsley Trust Co.*, Nos. 04-1521 & 04-2263, 2005 WL 1399307 (CA7 June 15, 2005) is misplaced because it cited a pre-*Herrnreiter* case, *Hilt-Dyson v. City of Chicago*, 282 F.3d 456 (CA7 2002), which in turn relied on *Stone*. *Stone* is no longer good law. *Williams*, 361 F.3d at 1031, n.4.

Reliance on *Markel v. Bd. of Regents of the Univ. of Wis. Sys.*, 276 F.3d 906 (CA7 2002), and *Graube v. Lau Indus.*, 257 F.3d 723 (CA7 2001), also is misplaced as both concerned discrimination not retaliation claims. Standards for discrimination and retaliation claims should differ. *See Johnson v. Milwaukee Sch. of Eng'g*, 258 F. Supp. 2d 896, 905-06 (E.D. Wis. 2003) (citing *Herrnreiter* and *Ray*, holding "[a] Title VII discrimination plaintiff must establish an adverse employment action. However, the same is not true in a retaliation case.").

[2] The split also results from confusion regarding the affect of the definition of "tangible employment action" in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). *Ellerth* concerned employer liability for sexual harassment. 524 U.S. at 761 (stating that the "tangible employment action" definition was "for resolution of the vicarious liability issue . . ."); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998) (holding affirmative defense is available "[w]hen no tangible employment action is taken"). Yet some courts have imported the "tangible employment action" definition into all Title VII claims. *See, e.g., White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795-800 and n.1 (CA6 2004). Others have taken

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Unlike the Fifth Circuit's categorical, "laundry list" approach, these circuits and the EEOC focus not on the *type* of employment action at issue, but upon the *retaliatory motive* and the *effects* on the employee, which necessarily requires a case-by-case approach. *See* Joan M. Savage, *Note: Adopting the EEOC Deterrence Approach to the Adverse Employment Action Prong in a Prima Facie Case for Title VII Retaliation*, 46 B.C. L. REV. 215, 216-17 (2004) (noting the above circuits "employ a broad, case-by-case approach, which focuses on the retaliatory motive rather than solely on the severity of the action"); *see also Smith v. Sec. of Navy*, 659 F.2d 1113, 1119-20 and n.56 (CADC 1981).

Yet, under the Fifth Circuit's strict test, the court categorizes actions as "ultimate" or not, with only the former supporting a claim. As a result, as shown in this case, important questions of motive and cumulative effect are dismissed by the analysis. The chill on an employee's willingness to oppose discrimination is not considered, which can emasculate effective enforcement of Title VII . Pet. at 19-20.

Moreover, even circuits that require "adverse employment action" nonetheless have explicitly rejected the Fifth Circuit's strict test. *See, e.g., White*, 364 F.3d at 795-800; *id.* at 808-17 (Clay, J., concurring); *see also* BIO at 12, n.6 (citing courts that have rejected Fifth Circuit's categorical approach and instead decide question on case-by-case basis).

In sum, the circuits have splintered, and this Court should grant certiorari in this case to resolve the confusion. *See* Savage, *Note: Adopting the EEOC Deterrence Approach*, 46 B.C. L. REV. at 230-38.

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the correct view that the "tangible employment action" definition should not be incorporated into all Title VII claims, and specifically not into retaliation claims. *Ray*, 217 F.3d at 1242, n.5 (rejecting argument that *Ellerth* sets standard for retaliation claims); *Hillig v. Rumsfeld*, 381 F.3d 1028, 1031-32 (CA10 2004) (same and noting *Ellerth* does not set standard for discrimination claims). Even if *Elleth*'s "tangible employment action" standard applies to retaliation claims, it conflicts with the Fifth Circuit's ultimate employment decision test. Pet. at 25-6.

2. The circuit split continues. Respondents acknowledge the split, but posit that the conflict is not as entrenched as *Ray* states, (BIO 7-10), and that the cases *Ray* relies upon are "outdated or simply wrong." *Id.* at 8. Yet, cases decided since *Ray* clearly demonstrate that the circuits remain deeply divided and show that the Ninth Circuit is not alone in adopting the EEOC's position.

For example, Respondents argue that the First Circuit in *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 22-27 (CA1 2002), moved away from an expansive retaliation standard articulated in *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (CA1 1994) (per curiam), which was cited approvingly in *Ray*. BIO at 8. Respondents assert that *Marrero* rejected a retaliatory harassment claim because it did not meet a "materially adverse" employment action standard. Yet, Respondents overlook that the First Circuit held this year that retaliatory harassment is actionable. *Noviello*, 398 F.3d at 76, 88-90. In so holding, the First Circuit recognized the circuit split and deferred to the EEOC standard adopted in *Ray*. *Id.* at 90.

Respondents next mistakenly argue that the Seventh Circuit has distanced itself from the broad language in *Knox v. State*, 93 F.3d 1327, 1334 (CA7 1996), which was cited approvingly in *Ray*. Rather, as noted by Judge Posner, speaking for the Seventh Circuit in *Herrnreiter*:

> We do not mean to suggest . . . that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 605-06 (7th Cir. 1999); *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001); *Passer v. American Chemical Society*, 935 F.2d 322, 331-32 (D.C. Cir. 1991); *EEOC Compliance Manual* § 8, P 8008 (1998) (directive No. 915.003); see also *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 891-92 (7th Cir. 1996). Some cases reach this conclusion by interpreting "adverse employment action" in the retaliation context as not requiring an actual *employment* action; an example is *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986-87 (10th Cir. 1996), where the retaliation took the form of preferring charges of theft and forgery against an employee

> who had filed a charge of discrimination. See also *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).... We left open in [another] case the question whether retaliation in other forms was actionable under Title VII [or whether retaliation must take the form of an adverse job action]. The cases cited earlier in this paragraph have now resolved the issue by holding that the provision is not so confined.

Ibid., 315 F.3d at 745-46 (emphasis in original); *see also Firestine v. Parkview Health Sys.*, 388 F.3d 229, 235 (CA7 2004) (retaliation is not limited to adverse job action). By citing the EEOC, *Ray*, *Passer* and *Berry* as stating the correct retaliation standard, the Seventh Circuit has placed itself solidly in line with *Ray*.

Finally, *Berry* articulated a broad retaliation test that is in line with *Ray*, but Respondents assert that the Tenth Circuit has since retreated. BIO at 9. Yet, just a year ago, the Tenth Circuit specifically held that "we have not abandoned the [adverse action] definition we used in *Berry* . . . we have continued to liberally define the term 'adverse employment action' and take a case-by-case approach." *Hillig*, 381 F.3d at 1031-33.

In sum, rather than converging on the Fifth Circuit's narrow test, other courts of appeals are adhering to a more expansive view of what constitutes actionable retaliation.

3. This split over the rationale and standard is not merely a difference in semantics; application of the varying tests is leading to divergent results. *See* Savage, *Note: Adopting the EEOC Deterrence Approach*, 46 B.C. L. REV. at 238. Had Petitioners worked in other circuits they would have had actionable retaliation claims, but because they worked in the Fifth Circuit, they were adjudged to have no claims.

Contrary to Respondents' characterization (BIO at 13-14), Petitioners not only claim that performance evaluations standing alone are actionable, but also claim that the poor performance reviews resulted in a lower raise when compared to similarly-situated colleagues and that the cumulative effect of the actions at issue constituted actionable retaliation. *See* Pet. at 4, 7. Indeed, Petitioner Cardenas-Garcia's performance review specifically criticizes his protected activity, and this

retaliatory review of his performance directly resulted in a reduced raise. *See* Pet. at 4.

Respondents' own authority supports finding an actionable retaliation claim. *See Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (CA1 1998) (noting retaliation "encompasses a variety of adverse employment actions, including ... unwarranted negative job evaluations"); *LaCroix v. Sears, Roebuck & Co.*, 240 F.3d 688, 691-92 (CA8 2001) (noting negative review would be actionable where used as a basis to detrimentally alter terms or conditions of employment); *Lyons v. England*, 307 F.3d 1092, 1118 (CA9 2002) (implying that performance evaluation that gives rise to further negative employment action would violate Title VII); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (CA9 1987) (holding that "transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions' cognizable under [Title VII's] retaliation provision"); *see also* Pet. at 20-22.[3]

Respondents' cases also confirm that the retaliatory investigation into Petitioner Rasty's alleged academic dishonesty and interference with his research, Pet. at 5-7, would be actionable outside the Fifth Circuit. *See also* Pet. at 22. For example, in *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1363-64 (CAFed. 2002), the Federal Circuit cited *Berry* favorably for the proposition

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[3] The case at bar is not merely misapplication of circuit precedent. BIO at 14, and n.8. First, *Felton v. Polles*, 315 F.3d 470, 488 (CA5 2002), did not suggest that a poor performance evaluation could be actionable if it directly affected compensation. Rather the court *assumed* that *postponing a raise* constituted actionable discrimination. Yet, the Fifth Circuit in this case held that a negative performance review, even if enacted with retaliatory motive and even though it resulted in a reduced raise, does *not* constitute an "ultimate employment action." Pet. App. at 2. Second, their reliance on *Harrington v. Harris*, 118 F.3d 359, 366 (CA5 1997), is misplaced, as discussed *supra* at 9-10. Finally, even if discrimination and retaliation cases should be analyzed under the same standards (and considering the pay raise issue alone), the reduced raises Petitioners received as a direct result of their discriminatory/retaliatory performance reviews is actionable in the Eleventh Circuit. *See Gillis*, 400 F.3d at 888 (any decision that "disentitles an employee to a raise of any significance is an adverse employment action").

that public investigations that could seriously harm future employment prospects would be actionable, but found no adverse action because the investigation "was not public." Here, the investigation into Rasty's alleged academic dishonesty (initiated on the heels of the conclusion of a discrimination grievance Rasty had filed, Pet. at 5-6) went to the heart of his career and future employment and was a public, two-year ordeal involving other faculty members.

In sum, application of these divergent tests is leading to real differences in results. Certiorari should be granted.[4]

4. A final point: this case is an ideal vehicle for resolving this important question. Pet. App. 20-23. Other cases presenting a similar question were inappropriate candidates. For example, in *Stavropoulos v. Firestone, et al.*, Case No. 04-1099, the alleged retaliatory acts "ultimately had no effect on [] employment status," including no impact on pay or benefits. *Id.*, Pet. App. at 11a. In sharp contrast, the retaliatory and discriminatory acts in this case did have a negative impact on Petitioners' employment status – they received lower salaries compared to similar non-minority faculty, were furnished unjustified poor performance reviews that resulted in proportionately lower raises and salaries, and Petitioner Rasty was subjected to costly and distracting investigations. Pet. App. 2-3. Moreover, the Fifth Circuit decided this case solely on the limited ground that the retaliatory acts did not meet the circuit's strict "ultimate employment decision" test; it did not reach alternative grounds, such as pretext.[5] Finally, the types of undisputed discriminatory

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[4] Respondents' citation to the Brief for Respondent in Opposition, *Vasquez v. Snow*, 541 U.S. 936 (2004) (mem.) (No. 03-887), is unpersuasive. BIO at 11. Though the brief noted that "it is unclear that there is any real difference in practice between the 'ultimate employment decision' standard . . . and the 'adverse employment action' standard," the Solicitor General made this point in reference to Eighth Circuit law. Brief for Respondent in Opposition at 5. The Eighth Circuit's position is almost as extreme as that of the Fifth. Pet. at 15-16.

[5] Other recent Fifth Circuit cases each were not worthy of certiorari. The question was not present in *Vasquez v. Snow*, 75 Fed. Appx. 275 (CA5 2003), *cert. denied*, 541 U.S. 936 (2004). Brief for Respondent Snow in Opposition at 4. In *Kang v. Bd. of Supervisors of La. State*

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and retaliatory acts as shown in the record below would allow the Court to determine what differences, if any, exist between actionable discrimination and retaliation claims.[6]

II. This Court Should Resolve The Circuit Split Over What Constitutes Discrimination.

A conflict exists between the Fifth and Eleventh Circuits regarding whether discriminatory pay raises are actionable. BIO 18-19. Respondents rely on *Harrington* to suggest that variations in pay raises of any significance may be actionable in the Fifth Circuit. BIO at 18. Yet, *Harrington* did not so hold, and it conflicts with the rationale and holding in *Gillis*, 400 F.3d at 888.[7] In *Harrington*, a threshold question was whether plaintiffs suffered an "adverse employment action." 118 F.3d at 365. Finding that "each Plaintiff did in fact receive, during each school year for which free speech retaliation is claimed, a merit pay increase," the Fifth Circuit

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Univ., 75 Fed. Appx. 974, 977 (CA5 2003), *cert. denied*, 541 U.S. 903 (2004), the complainant "receive[d] a pay raise and [ ]his raise was both substantial and larger than that received by some of his colleagues," thus indicating he may not have suffered an adverse action when compared to similarly-situated employees. Review in *Henandez v. Crawford Bldg. Material Co.*, 321 F.3d 528 (CA5 2003), *cert. denied*, 540 U.S. 817 (2003), would have been constrained because it would have been under a plain error standard (the employer had failed to object to jury instructions) rather than *de novo*, as it would be in this case.

[6] Contrary to Respondents' assertion (BIO 19-20), this Court will not get mired in alternative grounds for reversal. The questions presented are strictly limited to the appropriate standards for what constitutes actionable retaliation and discrimination; the Court may simply remand for further consideration, as it routinely does in employment cases.

To the extent Respondents argue (BIO at 17-18, n.10) that certiorari is inappropriate because it involves an unpublished, *per curiam* opinion, they forget this Court has granted certiorari before in such circumstances. *See, e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (*per curiam*).

[7] Besides being distinguishable on its facts, *Harrington* was not a Title VII discrimination case, but rather was a Section 1983 constitutional deprivation case, where public employee plaintiffs alleged retaliation for exercising First Amendment rights. *Ibid.*, 118 F.3d at 365.

held they did not have a viable First Amendment retaliation claim because "any harm resulting from decisions concerning 'pay increases' does not rise to the level of a constitutional deprivation." *Id.* at 366. The court followed circuit precedent and held that "a dispute over the quantum of pay increases" is not "an actionable adverse employment activity." *Id.* Even if it remained an open question after *Harrington* whether a dispute over pay raises is actionable, the Fifth Circuit answered it with a resounding "no" in this case.

The Fifth Circuit's rationale and result in the case under review directly conflicts with the Eleventh Circuit's in *Gillis*. *Gillis* follows a broader standard: "actions that affect compensation are considered adverse employment actions." *Ibid.* 400 F.3d at 887-88. *Gillis* recognized that "Title VII explicitly condemns discrimination in compensation" and held that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII." *Id.* at 888. *Gillis* conflicts with the reasoning and result in the case at bar. Pet. App. at 3 ("we have never held that a proportionately lesser pay increase, where an increase was received every year, could fulfill the [adverse action] requirement."); *cf. Russell v. Principi*, 257 F.3d 815, 817-19 (CADC 2001) (dispute over bonus actionable), *with Rabinovitz v. Pena*, 89 F.3d 482, 488-89 (CA7 1996) (dispute over bonus not actionable). Certiorari should be granted to resolve this conflict.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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July 21, 2005